SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918

No. 704

[illegible] NATIONAL BANK OF DAY CITY, PLAINTIFF IN ERROR,

vs.

[illegible] FELLOWS, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, ON THE RELATION OF UNION TRUST [illegible] ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

[illegible] SEPTEMBER 9, 1918.

(25,594)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 764.

FIRST NATIONAL BANK OF BAY CITY, PLAINTIFF IN ERROR,

vs.

GRANT FELLOWS, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, ON THE RELATION OF UNION TRUST COMPANY ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 8, 1916.

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1 *Petition of Relators.*

To Hon. Grant Fellows, Attorney General of the State of Michigan:

Your petitioners, the undersigned trust companies, organized and doing business in the State of Michigan, respectfully represent that under the provisions of Section 11 (*k*) of the Federal Reserve Act, the Federal Reserve Board has undertaken to confer upon the First National Bank of Bay City, a corporation organized under the National Banking Law, and located in Bay City, in this State, the power to act as trustee, executor, administrator and registrar of stocks and bonds, under such rules and regulations as the said Board may prescribe, and that said Bank is assuming to exercise such powers within this State.

Your petitioners further represent that they have been advised by their counsel, and so aver, that the exercise of such powers by said Bank is in contravention of the laws of this State and also that the action of the Federal Reserve Board, in attempting to confer such powers upon said Bank, is in violation of the Constitutions of the United States and of this State, and that the public interests will be seriously and injuriously affected if said Bank is permitted to continue the exercise of such powers thus unlawfully conferred upon it.

Wherefore, your petitioners pray that appropriate proceedings, by information, in the nature of a quo warranto, upon the relation of your petitioners, be instituted in the Supreme Court of this State, in order that the right of said Bank to exercise such powers may be determined; and your petitioners hereby offer to furnish
2 such indemnity against the costs and expenses of such proceeding as may be directed.

Respectfully submitted,

UNION TRUST COMPANY.
DETROIT TRUST COMPANY.
SECURITY TRUST COMPANY.
MICHIGAN TRUST COMPANY.
GRAND RAPIDS TRUST COMPANY.

3 STATE OF MICHIGAN,
Supreme Court:

GRANT FELLOWS, Attorney General of the State of Michigan, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Relators,

vs.

FIRST NATIONAL BANK OF BAY CITY, Respondent.

Quo Warranto.

On motion of Grant Fellows, attorney general, leave is hereby granted to file the within information, in the nature of a quo warranto.

FLAVIUS L. BROOKE,
Chief Justice, Supreme Court.

Lansing, June 9th, 1915.

Information.

STATE OF MICHIGAN,
Supreme Court, ss:

Grant Fellows, attorney general of the State of Michigan, on the relation of the Union Trust Company, Detroit Trust Company and Security Trust Company, each of the City of Detroit, Michigan, and the Michigan Trust Company and Grand Rapids Trust Company, each of the City of Grand Rapids, Michigan, all being domestic corporations organized under act number 108 of the Public Acts of 1889, comes into said Supreme Court, according to the statute in such case made and provided, upon leave of said Court first obtained, and gives the Court here to understand and be informed that on, to wit: the eighth day of April, 1915, the First National Bank
4 of Bay City, a banking corporation organized under the laws of the United States and located in this State, was doing business in Bay City, Michigan, and that said First National Bank, of Bay City, through its directors and other officers, has since said date, to wit: April eighth, 1915, exercised, and still does exercise, certain franchises and privileges not conferred upon it by law, to wit: the right to act as trustee, executor, administrator, and registrar of stocks and bonds, under such rules and regulations as the Federal Reserve Board may prescribe, in contempt of the people of the State of Michigan, and to their great damage and prejudice;

Wherefore, said Attorney General prays for due process of law against said First National Bank of Bay City in this behalf, to be made to answer to the said People by what warrant said First Na-

tional Bank of Bay City claims to exercise said franchises and privileges.

GRANT FELLOWS,
Attorney General.

HENRY M. CAMPBELL,
Detroit,
JOHN G. JOHNSON,
Philadelphia,
Counsel for Relators.

5 STATE OF MICHIGAN,
Supreme Court:

GRANT FELLOWS, Attorney General of the State of Michigan, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Relators,

vs.

FIRST NATIONAL BANK OF BAY CITY, Respondent.

Quo Warranto.

Rule to Plead.

On filing information, in the nature of a quo warranto, pursuant to statute; and on motion of Grant Fellows, attorney general, pursuant to rule. It is ordered, that said respondent plead to such information within twenty days after service upon it of the summons issued herein, and a copy of this rule; and that in default thereof, judgment be entered against said respondent.

GRANT FELLOWS,
Attorney General.

6 STATE OF MICHIGAN,
Supreme Court:

GRANT FELLOWS, Attorney General of the State of Michigan, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Relators,

vs.

FIRST NATIONAL BANK OF BAY CITY, Respondent.

Quo Warranto.

In the Name of the People of the State of Michigan to the Sheriff of the County of Bay:

You are hereby commanded to summon First National Bank of Bay City, if found in your bailiwick, to appear in said Supreme Court to answer to an information, in the nature of a quo warranto, filed against it by Grant Fellows, attorney general of said State; such ap-

pearance and answer to be made in accordance with the rules and practice of the court, within twenty (20) days after service of this summons, together with a copy of said information and of a rule to plead.

Service of this summons shall be made on or before July 1st, 1915, which is the return day hereof.

Witness, Hon. Flavius L. Brooke, Chief Justice, and the seal of said Court, at the City of Lansing, the place of holding said Court, this 9th day of June, 1915.

CHARLES C. HOPKINS, *Clerk.*

7 *Plea.*

STATE OF MICHIGAN,
Supreme Court:

No. 26853.

GRANT FELLOWS, Attorney General of the State of Michigan, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Relators,

vs.

FIRST NATIONAL BANK OF BAY CITY, Respondent.

Quo Warranto.

Now comes the said First National Bank of Bay City, Michigan, the respondent herein, by Gillett & Clark, its attorneys, and having read the information heretofore filed in the above entitled cause, for plea in behalf thereof, says:

1. Respondent is a duly organized and chartered National Banking Association, incorporated and existing under and by virtue of the Act of Congress providing for the organization and incorporation of National Banking Associations, and commonly known as the National Bank Act, approved June 3, 1864, and the amendments thereto.

2. That said Banking Association was originally incorporated under the name of the Bay National Bank of Bay City, on, to wit: December 4, 1882: That thereafter and on, to wit: the 28th day of April, 1891, such proceedings were had that the name of said Bank was changed from the Bay National Bank of Bay City to the First National Bank of Bay City; that thereafter, and on, to wit;

8 the 4th day of December, 1902, such proceedings were had that the corporate existence of said Bank was extended for a period of twenty (20) years from the 4th day of December, 1902, and for the information of the court there has been hereunto attached and made a part of respondent's plea,—

Exhibit A.—Articles of Association of the Bay National Bank of Bay City, dated December 1st, 1882.

Exhibit B.—The approval of the Comptroller of the Currency to the change of the name of the Bay National Bank of Bay City to the First National Bank of Bay City, which approval is dated April 28th, 1891.

Exhibit C.—The certificate of the Comptroller of the Currency extending the corporate existence of the First National Bank of Bay City for a period of twenty years from December 4, 1902, which certificate is dated December 4, 1902.

3. That under and by virtue of the provisions of an Act of Congress of the United States, commonly known as the Federal Reserve Act, approved December 23, 1913, and entitled, "An Act to provide for the establishment of Federal Reserve Banks, to furnish an elastic currency, to afford means of re-discounting commercial paper, to establish a more effective supervision of banking in the United States, and for other purposes," respondent filed its application to become a member bank, so-called, and thereafter subscribed for and paid for its proportion of stock in the Federal Reserve Bank as evidenced by three certain receipts, a copy of the first of which is hereto attached and made a part of respondent's plea, and marked Exhibit D, and respondent is now a member bank of said Federal Reserve Bank, District No. 7.

9 4. That thereafter and on, to wit: the 13th day of April, 1915, on application made therefor, the said Federal Reserve Board granted to said First National Bank of Bay City, the right to act as trustee, executor, administrator, and registrar of stocks and bonds, a true copy of which permit is hereunto attached and made a part of respondent's plea, and marked Exhibit E.

5. That by virtue of such permit respondent is now acting as trustee for bondholders and is named as mortgagee and trustee in a certain real estate mortgage given to secure to said bondholders the payment of the bonds mentioned in said mortgage and interest thereon.

6. Respondent is advised and therefore so avers that such grant and permit are not in contravention of any state or local law of Michigan.

7. Respondent is advised and therefore avers that there is no public grievance to be remedied by this proceeding, but the writ is prosecuted solely for the private benefit of the relators and any other trust companies that may be hereafter organized in the State of Michigan.

8. Wherefore, by virtue of the National Bank Act, so-called, being an Act of Congress of the United States, entitled, "An Act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3, 1864, and by virtue of the said Federal Reserve Act, approved December 23, 1913, the aforesaid respondent has used and exercised during the time mentioned in said information, and still uses and exercises the franchises and privileges, to

10 wit: the right to act as trustee, under such rules and regulations as the Federal Reserve Board may prescribe, as the said bank well might and still may, without this, that said First

National Bank of Bay City has usurped or does now usurp the rights, privileges or franchises aforesaid, or any of them, upon the said people of the State of Michigan, or any of them, as by the said information is averred, all of which matters the said Bank is ready to verify and prays that said information may be quashed and the proceedings dismissed.

Dated July 31, 1915.

GILLETT & CLARK,
Attorneys for Respondent,
Bay City, Mich.

EXHIBIT A.

Articles of Association.

For the purpose of organizing an association to carry on the business of banking under the laws of the United States, the undersigned subscribed for the stock of the Association hereinafter named, do enter into the following Articles of Association:

First. The name and title of this Association shall be "The Bay National Bank of Bay City."

Second. The place where its banking house or office shall be located and its operations of discount and deposit carried on, and its general business conducted, shall be the city of Bay City, county of Bay, and state of Michigan.

Third. The Board of Directors shall consist of nine shareholders.

The first meeting of the shareholders for the election of
11 Directors shall be held at the office of the First National Bank of Bay City, at three o'clock P. M. on the fourth (4) day of December, 1882, or at such other place and time as a majority of the undersigned shareholders may direct.

Fourth. The regular annual meetings of the shareholders for the election of Directors shall be held at the banking house of this Association on the second Tuesday of January of each year, but if no election shall be held on that day it may be held on any other day according to the provisions of Section 5149 of the Revised Statutes; and all elections shall be held according to such regulations as may be prescribed by the Board of Directors, not inconsistent with the aforesaid provisions of the said Section 5149 of the Revised Statutes.

Fifth. The capital stock of this Association shall be two hundred thousand dollars, to be divided into shares of one hundred dollars each; but the capital may be increased according to the provisions of Section 5142 of the Revised Statutes to any sum not exceeding seven hundred and fifty thousand dollars; and in case of the increase of the capital of the Association, each shareholder shall have the privilege of subscribing for such numbers of shares of the proposed increase of the capital stock as he may be entitled to according to the number of shares owned by him before the stock is increased.

Sixth. The Board of Directors, a majority of whom shall be a quorum to do business, shall elect one of their number to be President

of this Association, who shall hold his office (unless he shall be disqualified, or be sooner removed by a two-thirds vote of all the members of the Board) for the term for which he was elected a Director;
and they shall have power to elect a Vice President, who
12 shall also be a member of the Board of Directors, and who shall be authorized in the absence or inability of the President from any cause to perform all acts and duties pertaining to the office of President, except such as the President only is authorized by law to perform, and to elect or appoint a cashier and such other officers and clerks as may be required to transact the business of the Association; to fix the salaries to be paid to them, and continue them in office, or to dismiss them, as in the opinion of a majority of the Board, the interests of the Association may demand.

They shall also have power to define the duties of the officers and clerks of the association, to require bonds from them and to fix the penalty thereof; to regulate the manner in which elections of directors shall be held and to appoint judges of the elections; to provide for an increase of the capital of the Association, and to regulate the manner in which such increase shall be made; and generally to do and perform all the acts that it may be legal for a Board of Directors to do under the Revised Statutes aforesaid; and they shall also have the power to make all by-laws that it may be proper and convenient for them to make, not inconsistent with law for the general regulation of the business of the Association and the management and administration of its affairs.

Seventh. This Association shall continue for the period of twenty years from the date of the execution of its organization certificate, unless sooner placed in voluntary liquidation by the act of its shareholders owning at least two-thirds of its stock, or otherwise dissolved by authority of law.

Eighth. These Articles of Association may be changed or amended
at any time by shareholders owning a majority of the stock
13 of the Association, in any manner not inconsistent with law, and the Board of Directors or any three shareholders, may call a meeting of the shareholders for this or any other purpose not inconsistent with law, by publishing notice thereof for thirty days in a newspaper published in the town, city or county where the Bank is located, or by notifying the shareholders in writing.

In Witness Whereof, We have hereunto set our hands this first day of December, eighteen hundred and eighty-two.

James Shearer,
Herschel H. Hatch,
Thomas Cranage, Jr.,
Charles E. Jennison,
Frank Fitzhugh,
Selwyn Eddy,
Gurden K. Jackson,
William E. Vaughan,
John Herbert Avery,
William H. Miller,
Albert B. Griswold,
Edward G. Williams,
Charles F. Eddy,
Luther L. Hotchkiss,
John O. Woolson,
Eugene Fifield,
Jesse F. Romer,
John Shaw,
Robert S. Pratt,
John F. Eddy,

Charles A. Eddy,
Harry Griswold,
Frederick L. Gilbert,
John H. Yawkey,
Nelson Nelles,
Clark Moulthrop,
Charles G. Rogers,
John Mulholland,
Byron E. Warren,
William O. Clift,
Alexander Folsom.

I certify that the Articles of Association of The Bay National Bank of Bay City, located at Bay City, state of Michigan, were executed in duplicate and that one of the instruments so executed is the foregoing and that the other in all respects like the foregoing is on file with said Bank.

FREDERICK P. BROWNE, *Cashier.*

Bay City, Mich., Dec. 15th, 1882.

14 EXHIBIT B.

No. 2853.

E. Z. P.

Treasury Department,

Office of the Comptroller of the Currency.

Whereas, by satisfactory evidence presented to me, it appears that under the authority of the Act of Congress approved May 1, 1886, entitled "An act to enable national banking associations to increase their capital stock, and to change their names or location," shareholders owning two-thirds of the stock of the national banking association heretofore known as "The Bay National Bank of Bay City," located in the City of Bay City, in the State of Michigan, have voted to change the name of the said association to "The First National Bank of Bay City," and have complied with all the provisions of said Act relative to national banking associations changing their name.

Now Therefore, It Is Hereby Certified, That the name of the said association has been changed to "The First National Bank of Bay City," and that such change of name is approved by me, in accordance with the provisions of the act aforesaid.

In Testimony Whereof, Witness my hand and seal of office this 28th day of April, A. D. 1891.

[SEAL.]

E. S. LACEY,
Comptroller.

15 EXHIBIT C.

Treasury Department,

Office of the Comptroller of the Currency.

WASHINGTON, D. C., December 4, 1902.

Whereas, by satisfactory evidence presented to the undersigned, it has been made to appear that the First National Bank of Bay City, located in the city of Bay City, in the county of Bay, and state of Michigan, has complied with all the provisions of the Act of Congress to enable National Banking Associations to extend their corporate existence and for other purposes, approved July 12, 1882, now, therefore, I, William B. Ridgely, Comptroller of the Currency, do hereby certify that the First National Bank of Bay City, located in the city of Bay City, County of Bay, and State of Michigan, is authorized to have succession for the period specified in its amended articles of association, namely, until the close of business on December 4, 1922.

In Testimony Whereof, witness my hand and seal of office this fourth day of December, 1902.

[SEAL.] WILLIAM B. RIDGELY,
Comptroller of the Currency.

EXHIBIT D.

Federal Reserve Bank of Chicago.

District No. 7. No. of Shares, 180.

Certificate of Payment of First Installment of Capital Stock Subscription.

$3,000. No. of Shares, 180.

16 This is to certify that First National Bank of Bay City, Mich., has paid the sum of Three Thousand Dollars as the first installment of its subscription to one hundred and eighty shares of the capital stock of the Federal Reserve Bank of Chicago, such payment having been made in accordance with Section 2 of the Act of Congress, approved December 23, 1913, known as the Federal Reserve Act, and in response to call made by the Federal Reserve Board, pursuant to said Act.

This certificate is non-transferable and cannot be assigned as security for any indebtedness.

In Witness Whereof, the said Federal Reserve Bank of Chicago

has caused this certificate to be signed by its Governor, its corporate seal attached, attested by its Secretary, on this, Nov. 2, 1914.

[SEAL.] J. B. McDOUGAL,
Governor.

Attest:
W. F. McLALLEN,
Secretary.

(There are also two other certificates similar in all respects to the above, save the dates, for the two other installments, now in possession of respondent.)

17 EXHIBIT E.

Federal Reserve Bank of Chicago,
79 West Monroe Street.

OFFICERS:

James B. McDougal, Governor.
C. R. McKay, Deputy Governor.
W. F. McLallen, Secretary.
B. G. McCloud, Cashier.

DIRECTORS:

C. H. Bosworth, Chairman and Federal Reserve Agent.
J. B. Forgan, Chicago, Ill.
M. B. Hutchison, Ottumwa, Iowa.
E. L. Johnson, Waterloo, Iowa.
H. B. Joy, Detroit, Mich.
W. F. McLallen, Deputy Federal Reserve Agent.
E. T. Meredith, Des Moines, Iowa.
G. M. Raynolds, Chicago, Ill.
A. H. Vogel, Milwaukee, Wis.

Chicago ,April 13th, 1915.

First National Bank, Bay City, Michigan.

GENTLEMEN: I have the honor to inform you that the Federal Reserve Board has acted favorably upon your application for permission to act as Trustee, Executor, Administrator and Registrar of Stocks and Bonds, and this will be your formal notice to that effect.

Yours truly,

C. H. BOSWORTH,
Chairman.

C. H. B./L.

18 *Demurrer.*

STATE OF MICHIGAN,
Supreme Court:

GRANT FELLOWS, Attorney General of the State of Michigan, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Relators,

vs.

FIRST NATIONAL BANK OF BAY CITY, Respondent.

Quo Warranto.

Now Comes Grant Fellows, Attorney General of the State of Michigan, on the relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company and Grand Rapids Trust Company, relators, and by protestation, not confessing or acknowledging all or any of the matters and things in the plea of the respondent, heretofore filed, to be true in such manner and form as the same are therein set forth, doth demur to said plea, and for cause of demurrer avers that the said plea is insufficient in law to constitute an answer or defense to the information heretofore filed, for the following reasons:

(1) Because Section 11 (*k*) of the Federal Reserve Act in pursuance of which the Federal Reserve Board has attempted to confer upon the respondent the right to act as trustee, executor, administrator and registrar of stocks and bonds, under such rules and regulations as said Board may prescribe, is unconstitutional and void, in that Congress is not authorized by the Constitution of the United States to confer upon national banks the corporate powers specified in said section.

in said section.

19 (2) Because even if Congress itself possessed the authority to confer upon national banks the corporate powers specified in said section 11 (k), it cannot lawfully delegate such authority to the Federal Reserve Board.

(3) Because the granting of the corporate powers specified in said Section 11 (k) by the Federal Reserve Board to the respondent is in contravention of the laws and policy of this State.

Wherefore, the said Attorney General demands judgment of ouster against the respondent and prays that it may be enjoined and excluded from acting as trustee, executor, administrator or registrar of stocks and bonds, together with judgment against said respondent for the reasonable costs in this behalf sustained.

GRANT FELLOWS,
Attorney General.
HENRY M. CAMPBELL,
JOHN G. JOHNSON,
Counsel for Relators.

The undersigned counsel for Relators hereby certifies that the foregoing demurrer is not interposed for delay, and that, in his opinion, the demurrer is well founded in law.

HENRY M. CAMPBELL,
Counsel for Relators.

20 *Petition of Federal Reserve Board for Leave to File Briefs.*

No. 26853.

GRANT FELLOWS, Attorney General of the State of Michigan, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Relators,

vs.

FIRST NATIONAL BANK OF BAY CITY, Respondent.

Quo Warranto.

September 25, 1915.

To the Honorable the Supreme Court of Michigan:

This day comes, by Counsel, the Federal Reserve Board, created and organized under an act of Congress approved December 23, 1913, and asks leave of court for permission to file a brief in support of the constitutionality of Section 11 (k) of the Act aforesaid, the legality and effect of which Section is involved in the above entitled cause, and respectfully represents to the Court:

(1) That pursuant to authority vested in it under the terms of the Act of Congress approved December 23, 1913, and known as the Federal Reserve Act, your petitioner, on April 8, 1915, granted to the respondent in this cause the right to act as trustee, executor, administrator and registrar of stocks and bonds.

(2) That the information filed and the process and pleadings in this cause have raised the issue of the right of your petitioner to exercise the powers vested in it by the Act aforesaid, and unless this right is sustained the respondent in this cause and other national banks created and organized under the laws of the United
21 States will be deprived of certain of their corporate rights and franchises.

FEDERAL RESERVE BOARD,
By M. C. ELLIOTT,
J. P. COTTON,
Counsel.

GILLETT & CLARK,
Attorneys for Petitioner.

22 *Order Permitting Federal Reserve Board to File Briefs.*

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court room, in the Capitol, in the City of Lansing,

on the 9th day of November, in the year of our Lord one thousand nine hundred and fifteen.

Present: The Honorable Flavius L. Brooke, Chief Justice; Franz C. Kuhn, John W. Stone, Russell C. Ostrander, John E. Bird, Joseph B. Moore, Joseph H. Steere, Rollin H. Person, Associate Justices.

No. 26853.

GRANT FELLOWS, Attorney General of the State of Michigan, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Relators,

vs.

FIRST NATIONAL BANK OF BAY CITY, Respondent.

Quo Warranto.

On reading and filing the petition of the Federal Reserve Board created and organized under an act of Congress approved December 23, 1913, asking leave of court to file a brief and to be heard in this cause, and all parties in interest consenting thereto.

It is ordered, That the said Federal Reserve Board, through their counsel, are hereby authorized and permitted to file such brief or briefs as they may desire in this cause, copies to be served upon counsel for all parties ten days before hearing, and to be heard on the oral argument thereof as amici curiæ.

23 At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the Twenty-third Day of July, in the Year of our Lord One Thousand Nine Hundred and Fifteen.

Present: The Honorable—

Flavius L. Brooke, Chief Justice.
Franz C. Kuhn,
John W. Stone,
Russell C. Ostrander,
John E. Bird,
Joseph B. Moore,
Joseph H. Steere,
Associate Justices.

26853.

GRANT FELLOWS, Attorney General, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Relators,

vs.

FIRST NATIONAL BANK OF BAY CITY, Respondent.

On reading and filing stipulations consenting thereto, It is Ordered that respondent in the above entitled cause may have twenty days

additional time in which to plead or demur that is to say forty days from the date of service of the summons.

24 At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the Eighth Day of November, in the Year of our Lord One Thousand Nine Hundred and Fifteen.

Present: The Honorable—

John W. Stone,
Russell C. Ostrander,
Rollin H. Person,
Joseph B. Moore,
Joseph H. Steere,
Associate Justices.

26853.

GRANT FELLOWS, Attorney General of the State of Michigan, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Relators,

vs.

FIRST NATIONAL BANK OF BAY CITY, Respondent.

On reading and filing the petition of the Federal Reserve Board created and organized under an act of the Congress approved December 23, 1913, asking leave of court to file a brief and to be heard in this cause, and all parties in interest consenting thereto.

It is Ordered that the said Federal Reserve Board through their counsel are hereby authorized and permitted to file such brief or briefs as they may desire in this cause, copies to be served upon Counsel for all parties ten days before hearing and to be heard on the oral argument thereof as amici curiæ.

25 At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the twentieth day of January, in the year of our Lord one thousand nine hundred and sixteen.

Present: The Honorable John W. Stone, chief Justice. Franz C. Kuhn, John E. Bird, Joseph B. Moore, Joseph H. Steere, Flavius L. Brooke, Rollin H. Person, Associate Justices.

26853.

GRANT FELLOWS, Attorney General, ex Rel. UNION TRUST COMPANY et al.

vs.

FIRST NATIONAL BANK OF BAY CITY.

This cause coming on to be heard is argued by Mr. Campbell for Relators and by Mr. Clark and Mr. Elliott for Respondent and duly submitted.

26 *Opinion.*

STATE OF MICHIGAN,
Supreme Court:

Filed September 26, 1916.

GRANT FELLOWS, Attorney General of the State of Michigan, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Relators,

v.

FIRST NATIONAL BANK OF BAY CITY, Respondent.

Before the Full Bench.

BROOKE, *J.:*

The attorney general of the State upon the relation of five trust companies, organized and doing business under the laws of the State, by permission granted, filed in this court an information in the nature of a proceeding quo warranto against the First National Bank of Bay City, by means of which relators question the right of the respondent to act as trustee, executor, administrator, and registrar of stocks and bonds under such rules and regulations as the Federal Reserve Board may prescribe, it being claimed that the exercise by respondent of said franchises and privileges is in contempt of the people of the State of Michigan and to their great damage and prejudice.

To the information so filed respondent interposed a plea setting out that it is a duly organized and chartered banking association incorporated under the National Bank act approved June 3, 1864, and the amendments thereto. Further answering, respondent says that under and by virtue of an Act of Congress, commonly known as the Federal Reserve Act, approved December 23, 1913, entitled "An Act to provide for the establishment of Federal Reserve Banks,
to furnish an elastic currency, to afford means of re-discount-
27 ing commerical paper, to establish a more effective supervision of banking in the United States, and for other purposes," it filed its application to become a member bank, and thereafter subscribed for and paid for its propertion of stock in the Federal Reserve Bank, whereupon it then became and now is a member bank of said Federal Reserve Bank, District 7. Further, that thereafter on the 13th day of April, 1915, on application made therefor, the said Federal Reserve Board granted to said respondent the right to act as trustee, executor, administrator, and registrar, of stocks and bonds, and that by virtue of such permit respondent is now acting as trustee for bondholders and is named as mortgagee and trustee in a certain real estate mortgage given to secure to said bondholders the payment of the bonds mentioned in said mortgage and interest thereon. Further, that respondent is advised that such

grant and permit are not in contravention of any state or local law in Michigan, and that there is no public grievance to be remedied by this proceeding, but that the writ is prosecuted solely for the private benefit of the relators and other trust companies that may be hereafter organized in the State.

To this plea the attorney general demurred upon the following grounds:

"1. Because Section 11 (*k*) of the Federal Reserve Act in pursuance of which the Federal Reserve Board has attempted to confer upon the respondent the right to act as trustee, executor, administrator and registrar of stocks and bonds, under such rules and regulations as said Board may prescribe, is unconstitutional and void, in that Congress is not authorized by the Constitution of the United States to confer upon national banks the corporate powers specified in said section.

"2. Because even if Congress itself possessed the authority to confer upon national banks the corporate powers specified in said section 11 (*k*), it cannot lawfully delegate such authority to the Federal Reserve Board.

"3. Because the granting of the corporate powers specified in said Section 11 (*k*) by the Federal Reserve Board to the Respondent is in contravention of the laws and policy of this State.

The question presented arises under Sec. 11 of the so-called Federal Reserve Act, which, among other things, provides:

"The Federal Reserve Board shall be authorized and empowered * * *

"(*k*) To grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said board
27½ may prescribe."

The first proposition raised by counsel for respondent is that the courts of this State are without jurisdiction to oust a corporation organized under the laws of the United States, or to enjoin such corporation from enjoying any or all of its franchises within the borders of the State. Although the question is not raised by the pleadings we think it should be determined adversely to the contention of counsel for the Federal Reserve Board, who, by leave of the court, were permitted to file a brief and make an argument in the case. No one would contend that final determination as to the validity of an Act of Congress does not rest with the Federal Supreme Court, but it is, we think, equally clear that any State may by quo warranto inquire by what authority any corporation exercises corporate rights within its borders. In the case of Attorney General v. A. Booth & Co., 143 Mich. 89, this court said:

"But proceedings in the nature of quo warranto are appropriate to try the right of a domestic corporation to act as such, and there would seem to be a close analogy between such a case and one where the proceeding is resorted to for the purpose of inquiry into the right of a foreign corporation to do business in another State than that of its organization, as it would be in the home State if the ob-

ject was to inquire into a right to exercise franchise in excess of those granted." (Citing cases.)

See also Mason v. Perkins, 73 Mich., 303; People v. Pres., etc. of Manhattan Co., 9 Wendell (N. Y.) 351; and cases cited in note 1 page 1426 of 32 Cyc.

The legality of the incorporation of the respondent is not questioned by the proceeding. The inquiry is instituted for the purpose of ascertaining whether its assumption of a franchise to do business of a certain character is with or without legal warrant, that business being apparently not incidental to banking, and peculiarly under the control of state laws. Counsel for relators present the question under three heads as follows:

"1. Congress is not authorized by the Constitution to confer upon national banks the corporate powers specified in Sec. 11 (*k*).

"2. Sec. 11 (*k*) is void because Congress cannot delegate to the Federal Reserve Board the authority attempted to be conferred by this section.

"3. The granting of authority to the respondent to act as trustee, executor, administrator, and registrar of stocks and bonds is in contravention of the laws and policy of this State.

28 In view of our conclusions hereinafter stated with reference to the third point raised, we find it unnecessary to give any consideration to points numbered one and two. An extended discussion on these questions will be found in the recent case of People of the State of Illinois v. Brady, 110 N. E. 864, (Ill.).

Assuming then for the purposes of this case that Congress might constitutionally enact the legislation in question, it will be noted that under subsection (*k*) of Sec. 11, the Federal Reserve Board is authorized to grant permission to National Banks to act as trustees, etc., only when the exercise of such franchises by them is "not in contravention of state or local law."

It is vigorously asserted on behalf of relators that such authorization to the National Banks of this State is in contravention of state law.

On the other hand, counsel for respondent state their position upon this point as follows:

"(*a*). There is nothing in the state law specifically prohibiting any person or corporation from acting as trustee, executor, registrar, etc.

"(*b*). In the absence of specific prohibition, the powers of a natural person to act in these capacities are unlimited, and the powers of a corporation are limited merely by the statute under which it is organized.

"(*c*). If national banks were organized under state laws it might be argued that an express prohibition was not required but that the mere absence of a state enabling act would be sufficient to limit their powers.

"(*d*). Inasmuch as national banks are organized under the acts of congress, no state enabling act is necessary to enable them to carry on a trust company business any more than to enable them

to carry on a banking business. Their authority is found in section 11K, and if this section is constitutional, its operation can be suspended only by a prohibitory statute of the state and not merely by the lack of an enabling state statute.

"(*e*). The authority given by section 11K does not compel the appointment of national banks as fiduciaries in any case, but merely permits such appointment. The probate court or other appointing authority still has full freedom of choice. A mere enlargement of such field of choice contravenes no law of the state.

"(*f*). All references to state "policy" are beside the point. The state legislature has had at least one regular session since the passage of the federal reserve act, and has not seen fit to prohibit national banks from qualifying as fiduciaries under section 11K. Its omission to do so is more significient than the claimed existence of a state policy, which is at best doubtful, vague and indefinite. The courts should require the state to express itself positively and definitely on a question of such importance."

29 Whether the subjects mentioned in Sec. 11 (*k*) are subjects over which the state has exclusive jurisdiction, or whether they or some of them may properly be subject to federal legislation, it is not necessary to determine. As to estates of decedents, however, see Dickinson v. Seaver, 44 Mich., 624; Lafferty v. Peoples' State Bank, 76 Mich. 35; American Missionary Ass'n v. Hall, 138 Mich., 247.

The real point in issue in this proceeding is whether the exercise by National Banks of the powers of trustees, executors, administrators, etc., is in contravention of local law.

An examination of our statutes clearly shows that the state has legislated very fully with reference to each of the subjects mentioned in Sec. 11 (*k*). Chapter 285 Howell's Statutes, 2nd Ed., is devoted to the subjects of trusts, and therein provision is made for their definition, regulation and administration. Chapters 290 to 301 Howell's Statutes, 2nd Ed., are devoted to laws relative to the settlement of estate of deceased persons. The administration of testate estates is by the law of this State committed to the person named as executor therein, if he is legally competent. 4 H. S. Sec. 11026.

In the case of intestate estates "to one or more of the persons hereinafter mentioned." 4 H. S. Sec. 11040.

While the word "person" is not defined in the statutes cited, to read them is to be convinced that the term was used in a restricted sense and was meant to apply to natural persons only and not to corporations. In reaching this conclusion we are not unmindful of the rule of construction, 1 H. S. Sec. 2 Sub.-Sec. 12, which provides:

"The word 'person' may extend and be applied to bodies politic and corporate, as well as to individuals."

Our determination as to the meaning of the word "person" as employed in these statutes is in harmony with the decision in Grunow v. Simonitsch, 21 N. D., 277, where in construing a similar statute, the court said:

30 "It is perfectly apparent to our minds that, until the enactment of §4682, the legislature had in the most explicit manner expressed its intention to restrict such appointments to natural persons. By the enactment of §4682 it is equally apparent that the only change which the legislature intended to make in the existing statute was to permit domestic annuity, safe deposit, and trust companies to receive such appointments."

See also In re Avery's Estate, 92 N. Y. Supp. 974.

In the year 1889 the law relative to the administration of estates of decedents and the execution of trusts was changed by enactment. 3 H. S., 2nd Ed. Chap 104, Sec. 6476-6510. Except as authorized under said act, no corporation in Michigan is empowered to administer trusts or to act as executor or administrator. A corporation may exercise only those powers conferred upon it by its charter under the law of its organization. In authorizing certain corporations organized under the act in question to execute trusts and administer estates, the legislature imposed very stringent conditions. It fixed a minimum capitalization; required the investment of a certain percentage of the capital in specified securities, and compelled the making of a fixed deposit with the State Treasurer for the purpose of securing depositors and creditors; it fixed the number and qualifications of directors and imposed penalties for fraud and embezzlement; it regulated investments of the corporation; and provided for complete supervision by the State Banking Department. Many of the regulations imposed could not be complied with by a National Bank.

We cannot agree with the contention of counsel for respondent that relators must point to a specific prohibitory law—a law absolutely forbidding National Banks to engage in the activities specified in Sec. 11 (*k*). We believe that the legislature, in the enactment of the so-called trust, deposit, and security statute, and clothing corporations organized thereunder with the powers therein defined, by unavoidable inference excluded all other corporations within the state from the exercise of these powers. Now do we believe, as claimed by counsel for respondant, that the exercise of such powers by National Banks is at most contrary only to the public policy of the state. Our legislation upon the subjects involved in Sec. 11 (*k*) is so particular and so voluminous, and the legislative purpose so apparent,

30½ that we have no hesitation in reaching the conclusion that the exercise of the powers enumerated in Sec. 11 (*k*) by National Banks would be "in contravention of State law." While the decision in People of the State of Illinois v. Brady, supra, on this point is to the same effect, it is, of course, not controlling because the court of Illinois dealt with the statutes of that state, which differ materially from our own. The same may be said of the decision in Appeal of Woodbury, 96 Atl. (N. H.), 299, which arose in the State of New Hampshire.

It is, we think, clear that in the enactment of the trust legislation adverted to, the state sought to surround the execution of trusts and the administration of estates by corporations with certain safeguards which would be wholly lost if National Banks within the

state were permitted to exercise the functions enumerated under Sec. 11 (*k*).

We are therefore of opinion that the prayer of the relators should be granted and that the respondent be enjoined and excluded from acting as trustee, executor, administrator, and registrar of stocks and bonds. No costs will be allowed.

FLAVIUS L. BROOKE.

Endorsed: Filed Sept. 26, 1916. Jay Mertz, Clerk Supreme Court.

31 STATE OF MICHIGAN,
Supreme Court:

Filed September 26, 1916.

GRANT FELLOWS, Attorney General of the State of Michigan, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Relators,

v.

FIRST NATIONAL BANK OF BAY CITY, Respondent.

Before Stone, C. J., Kuhn, Ostrander, Bird, Moore, Steere, Brooke, Person, J. J.

OSTRANDER, *J.:*

If at any time in this State only individuals could execute trusts, manage trust funds, and act as executors and administrators of estates of deceased persons, it was because there had been created no corporation with the proper powers. It was within the power of the legislature to create, or provide for creating, such corporations, and, as the idea of corporate usefulness and efficiency became general, the legislature did provide for creating corporations with the necessary powers. Having provided for the creation of such domestic corporations, foreign corporations, having proper powers, may, upon such reasonable conditions as the legislature may prescribe, be admitted to do in this State what domestic corporations may do.

There is, therefore, no State policy opposed to corporate trustees, executors or administrators. No corporation, and for that matter no individual, can in any event act in any of the capacities indicated except by appointment. And a corporation, or an individual, in such relations, is governed by the laws of the State and the orders of State courts.

32 National banks are, and are not, foreign corporations. They are creatures of congress, agencies of the federal government, domesticated in the State. They may sue and be sued in the courts of the State, but the powers they shall possess, their management and control are beyond State authority, except that a bank like the respondent may not exercise certain powers—cannot lawfully possess them—in contravention of State law.

No State law is contravened—opposed, come into conflict with—because a corporation exercises the indicated powers, nor by the act of congress creating national banks. The legislature has not declared that national banks in this State shall not have the right "to act as trustee, executor, administrator, or registrar of stocks and bonds."

And I do not find in Brother Brooke's opinion reference to any State law that will be contravened if respondent continues to act in the indicated capacities. To say that because the legislature has required certain things of a domestic corporation as a condition to the exercise of the right and cannot require the same, or similar, things from national banks, therefore the exercise of the right by national banks will be in contravention of State law, seems to me to be an unsound argument. The bank is here, with such structure as congress has given it, and congress has in terms declared that among other functions it may perform that of a trustee, etc., if any body wants it to. The mere element of safety of a fund is a matter to be considered by those applying to the corporation to take charge of it, or by the court making an appointment. That one may regard the domestic corporation as the safer institution is not evidence that the other, if it acts, acts in contravention of State law. Certain safeguards surrounding the execution of trusts, etc., by domestic corporations are lost when individuals are appointed to execute them. The individual does not therefore act in contravention of State law.

Mr. Justice Brooke does not point out in what way, if
33 respondent acts within its apparent powers, the operations of any State law governing trusts, or the settlement of estates, will be interfered with. I am not content to rest so important a decision upon a doubtful inference. We must come, I think, to the question: Has respondent the power which the court is informed it is exercising? The question is a delicate one, less so, I think, because of the decisions of the federal court.

The power of congress to create national banks is sustained upon the theory that a bank, to the government,

"is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations." M'Culloch v. State of Maryland, 4 Wheat. 316.

"The bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government, is admitted; but the bank is not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that congress could create such a corporation. * * * Why is it that congress can incorporate or create a bank? This question was answered in the case of M'Culloch v. The State of Maryland. It is an instrument which is 'necessary and proper' for carrying on the fiscal operations of the government. Can this instrument, on any rational calculation, effect its object, unless it be endowed with that faculty of lend-

ing and dealing in money which is conferred by its charter? If it can, if it be as competent to the purposes of government without as with this faculty, there will be much difficulty in sustaining that essential part of the charter. If it cannot, then this faculty is necessary to the legitimate operations of government, and was constitutionally and rightfully engrafted on the institution. * * * The operations of the bank are believed not only to yield the compensation for its services to the government, but to be essential to the performance of those services. Those operations give its value to the currency in which all the transactions of the government are conducted. They are, therefore, inseparably connected with those transactions. They enable the bank to render those services to the nation for which it was created, and are, therefore, of the very essence of its character, as national instruments. The business of the bank constitutes its capacity to perform its functions, as a machine for the money transactions of the government. Its corporate character is merely an incident, which enables it to transact that business more beneficially." Osborn v. The Bank of the United States, 9 Wheat. 738.

See, also, Farmers' 'Mechanics' Nat. Bank v. Dearing, 91 U. S., 29.

Undoubtedly, all presumptions are in favor of the constitutionality of the act in question here and congress is the judge, within the exercise of its powers, of the functions a national bank should perform. But in the reasoning of the judges, in the opinions to which I have referred, I find, I think, a conclusive argument supporting the proposition that congress has exceeded its constitutional
34 powers in granting to banks the right to act as trustees, executors and administrators. If for mere profit it can clothe this agency with the powers enumerated, it can give it the rights of a trading corporation, or a transportation company, or both. There is, as Judge Marshall points out, a natural connection between the business of banking and the carrying on of federal fiscal operations. There is none, apparently, between such operations and the business of settling estates, or acting as the trustee of bondholders. This being so, there is in the legislation a direct invasion of the sovereignty of the State which controls not only the devolution of estates of deceased persons and the conducting of private business within the State, but as well the creation of corporations and the qualifications and duties of such as may engage in the business of acting as trustees, executors and administrators. Such an invasion I think the court may declare and may prevent by its order operating upon the offending agency. I concur, therefore, in the conclusion arrived at by Mr. Justice Brooke.

RUSSELL C. OSTRANDER.
J. W. STONE.
FRANZ C. KUHN.
JNO. E. BIRD.
J. H. STEERE.
ROLLIN H. PERSON.

I think the writ ought to be granted for the last reason stated by Justice Ostrander.

JOSEPH B. MOORE.

Endorsed: Filed Sept. 26th, 1916. Jay Mertz, Clerk Supreme Court.

35 STATE OF MICHIGAN,
Supreme Court:

At a session of said Court held in the City of Lansing, State of Michigan, on the 26th day of September, A. D. 1916.

Present: Hon. John W. Stone, Chief Justice; Hon. Franz C. Kuhn, Hon. Russell C. Ostrander, Hon. John E. Bird, Hon. Joseph B. Moore, Hon. Joseph H. Steere, Hon. Flavius L. Brooks, Hon. Rollin H. Person, Associate Justices.

No. 26853.

GRANT FELLOWS, Attorney General of the State of Michigan, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Relators,

vs.

FIRST NATIONAL BANK OF BAY CITY, Respondent.

Quo Warranto.

The above entitled cause coming on to be heard upon the information of the Attorney General, the plea of the respondent, and the demurrer to said plea filed by the Attorney General.

36 And the said Grant Fellows, Attorney General, Henry M. Campbell and John G. Johnson, counsel for relators, Gillett & Clark, counsel for respondent, and M. C. Elliott and J. P. Cotton, counsel for the Federal Reserve Board, appearing by special leave of the Court, having been duly heard, and it appearing to the Court that the respondent is exercising certain franchises and privileges not conferred upon it by law, to-wit: the right to act as trustee, executor, administrator and registrar of stocks and bonds.

It is ordered, adjudged and decreed that said First National Bank of Bay City be, and is hereby enjoined and excluded from exercising said franchises and privileges, to-wit: the right to act as trustee, executor, administrator and registrar of stocks and bonds.

It is further ordered, adjudged and decreed that no costs be allowed in said proceeding.

36½ [Endorsed:] Quo Warranto No. 26853. State of Michigan Supreme Court. Grant Fellows, Attorney General of State of Michigan, on the relation of Union Trust Company et al., relators, vs. First National Bank of Bay City, respondent. Judgment of Ouster. Henry M. Campbell and John G. Johnson, Counsel for Relators, Union Trust Building, Detroit.

37 STATE OF MICHIGAN,
Supreme Court:

No. 26853.

GRANT FELLOWS, Attorney General of the State of Michigan, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Relators,

vs.

FIRST NATIONAL BANK OF BAY CITY, Respondent.

Quo Warranto.

The petition of the above named respondent, First National Bank of Bay City, hereby sets forth that on the 26th day of September, 1916, the Supreme Court of the State of Michigan made and entered a final order and judgment herein in favor of the above named relators and against the above named respondent, in which final order and judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of said respondent, First National Bank of Bay City all of which will more in detail appear from the assignment of errors which is filed with this petition.

That the said Supreme Court of the State of Michigan is the highest court of the said State of Michigan in which a decision in this suit and in this matter could be had.

Wherefore, First National Bank of Bay City petitions and prays that a writ of error from the Supreme Court of the United States may be issued in this behalf to the Supreme Court of the State of Michigan for the correction of errors so complained of and that a transcript of record proceedings and papers in this cause duly
38 authenticated may be sent to the Supreme Court of the United States.

Dated this 24th day of October, 1916.

H. M. GILLETT,
EDWARD L. CLARK,
Attorneys for Respondent, First National Bank of Bay City.

39 STATE OF MICHIGAN,
Supreme Court:

No. 26853.

GRANT FELLOWS, Attorney General of the State of Michigan, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Relators,

vs.

FIRST NATIONAL BANK OF BAY CITY, Respondent.

Quo Warranto.

The above named respondent, First National Bank of Bay City, in connection with its petition for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Michigan, makes the following assignment of errors which it avers occurred upon the hearing and decision of the above entitled cause, to-wit:

(1) The Supreme Court of Michigan erred in holding that Section 11 (*k*) of the Federal Reserve Act so-called, being an act of Congress approved December 23, 1913 and entitled "An act to provide for the establishment of Federal Reserve Banks to furnish an elastic currency, to afford means of re-discounting commerical paper, to establish a more effective supervision of banking in the United States, and for other purposes," was and is void for the reason that the Congress of the United States in enacting the said Section 11 (*k*) exceeded the powers granted to the said Congress by the Constitution of the United States.

(2) The Supreme Court of Michigan erred in entering a judgment of ouster against the above named respondent, said judgment being based solely upon the decision that the act of Congress above mentioned was and is void as beyond the powers conferred upon the Congress of the United States by the Constitution of the
40 United States.

H. M. GILLETT,
EDWARD L. CLARK,
Attorneys for Respondent and Plaintiff in Error.

40½ [Endorsed:] 26853. State of Michigan Supreme Court. Grant Fellows, Attorney Gen'l of the State of Michigan, on the relation of Union Trust Company, Detroit Trust Company, Security Trust Company, and Grand Rapids Trust Company, Relators, vs. First National Bank, of Bay City, Respondent. Quo Warranto No. 26853. Petition for Writ of Error with Assignment of Errors. Gillett & Clark, 437-441 Shearer Bldg., Bay City, Mich.

41 STATE OF MICHIGAN,
Supreme Court:

At a session of said Court held in the City of Lansing, State of Michigan, on Wednesday the 25th day of October, A. D. 1916.

Present—Hon. John W. Stone, Chief Justice; Hon. Franz C. Kuhn, Hon. Russell C. Ostrander, Hon. John E. Bird, Hon. Joseph B. Moore, Hon. Joseph H. Steere, Hon. Flavius L. Brooke, Hon. Rollin H. Person, Associate Justices.

No. 26853.

GRANT FELLOWS, Attorney General of the State of Michigan, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Relators,

vs.

FIRST NATIONAL BANK OF BAY CITY, Respondent.

Quo Warranto.

The above entitled matter coming on to be heard upon the petition of the Respondent therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Michigan and upon the examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present to the Supreme Court of the United States the questions presented by the record in said matter.

42 It is ordered that a writ of error be and is hereby allowed to this court from the Supreme Court of the United States and that the bond presented by said petitioner be and the same is hereby approved.

JOHN W. STONE,
Chief Justice of the Supreme Court of the State of Michigan.

42½ [Endorsed:] 26853. State of Michigan. Supreme Court. Grant Fellows, Attorney Gen'l of The State of Michigan, on the relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Relators, vs. First National Bank, of Bay City, Respondent. Quo Warranto. No. 26853. Order allowing writ of error from Supreme Court of United States. Filed Oct. 25, 1916. Jay Mertz, Clerk. Gillett & Clark, 437-441 Shearer Bldg., Bay City, Mich.

43 UNITED STATES OF AMERICA, *ss:*

To Attorney General of the State of Michigan, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of State of Michigan, wherein First National Bank of Bay City is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John W. Stone, Chief Justice of the Supreme Court of the State of Michigan, this 25th day of October, in the year of our Lord one thousand nine hundred and sixteen.

JOHN W. STONE,
Chief Justice of the Supreme Court of the State of Michigan.

Attest:

[Seal of the Supreme Court of Michigan, Lansing.]

JAY MERTZ,
Clerk Supreme Court of Michigan.

43½ DETROIT, MICH., Oct. 27th, 1916.

I, attorney of record for the defendant in error in the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

HENRY M. CAMPBELL,
Attorney for Defendants in Error.

44 Copy.

STATE OF MICHIGAN,
Supreme Court:

No. 26853.

GRANT FELLOWS, Attorney General of the State of Michigan, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Relators,

vs.

FIRST NATIONAL BANK OF BAY CITY, Respondent.

Quo Warranto.

Know all men by these presents, that we, First National Bank of Bay City a national banking corporation of Bay City, Michigan,

as principal, and A. E. Bousfield and Wm. L. Clements of the same place, as sureties are held and firmly bound unto Grant Fellows as Attorney General of the State of Michigan in the sum of Five Hundred Dollars to be paid to the said obligee his successors and assigns; to the payment of which, well and truly to be made, we bind ourselves our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 24th day of October A. D. 1916.

Whereas, the above First National Bank of Bay City as respondent above named has filed its petition with the clerk of the Supreme Court of the State of Michigan for the issuance of a writ of error from the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Michigan.

Now, therefore, the condition of this obligation is such that if the above named respondent as plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

FIRST NATIONAL BANK,
Bay City, Mich.
WM. L. CLEMENTS, *Pres't.* [SEAL.]
D. H. BAKER, *Cashier.*
A. E. BOUSFIELD. [SEAL.]
WM. L. CLEMENTS. [SEAL.]

Sealed and delivered in the presence of—
A. E. HARRISON.
H. J. MARTIN.

STATE OF MICHIGAN,
County of Bay, ss:

William L. Clements and A. E. Bousfield the sureties above named each for himself makes oath that he is worth the penalty in the above bond over and above all debts, liabilities and exemptions.

JESSIE THOMPSON,
Notary Public, Bay County, Michigan.

Commission expires Apr. 16, 1919.

I hereby approve the foregoing bond and sureties thereon this 25th day of October, 1916.

JOHN W. STONE,
Chief Justice of the Supreme Court of the State of Michigan.

Attest:
JAY MERTZ,
Clerk Supreme Court of Michigan.

45 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Michigan before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Grant Fellows, Attorney General of the State of Michigan, on the relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company and First National Bank of Bay City, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution,
46 or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said First National Bank of Bay City as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 26th day of October, in the year of our Lord one thousand nine hundred and sixteen.

[Seal of the United States District Court, Eastern District of Mich.]

ELMER W. VOORHEIS,
Clerk of the United States District Court for the Eastern District of Michigan, Sixth Circuit.

Allowed by—
JOHN W. STONE,
Chief Justice of the Supreme Court of the State of Michigan.

Attest: JAY MERTZ,
Clerk of the Supreme Court of the State of Michigan.

47 To the Supreme Court of the United States:

The execution of the within Writ appears by the transcript of Record hereto annexed.

[Seal of the Supreme Court of Michigan, Lansing.]

JAY MERTZ,
Clerk of Supreme Court of State of Michigan.

48 Supreme Court of the State of Michigan.

FIRST NATIONAL BANK OF BAY CITY, Plaintiff in Error,
vs.
GRANT FELLOWS, Attorney General, on the Relation of Union Trust Company, Detroit Trust Company, Security Trust Company, Michigan Trust Company, and Grand Rapids Trust Company, Defendants in Error.

IN THE SUPREME COURT, *ss:*

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record, and of all proceedings had and determined in the above entitled cause by said Supreme Court, including the written decision and reasons therefor, signed by the Justice of said Court and filed in my office, as appears of record and on file in said court; that I have compared the same with the original and it is a true transcript therefrom and of the whole thereof; that attached thereto are the petition for the Writ of Error; the Writ of Error with allowance endorsed thereon, the Citation with acceptance of service endorsed thereon by the attorney for the adverse party, a copy of the bond duly approved, together with the assignments of error, in the Supreme Court of the United States.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at the City of Lansing this thirtieth day of October, in the year of our Lord, one thousand nine hundred and sixteen.

[Seal of the Supreme Court of Michigan, Lansing.]

JAY MERTZ,
Clerk of the Supreme Court of Michigan.

Endorsed on cover: File No. 25,594. Michigan Supreme Court. Term No. 764. First National Bank of Bay City, plaintiff in error, vs. Grant Fellows, Attorney General of the State of Michigan, on the relation of Union Trust Company et al. Filed November 3rd, 1916. File No. 25,594.

Office Supreme Court, U. S.
FILED
DEC 1 1916
JAMES D. MAHER
CLERK

In the

Supreme Court of the United States

October Term, 1916.

No. 764.

FIRST NATIONAL BANK OF BAY CITY, MICHIGAN,
PLAINTIFF IN ERROR,
v.
GRANT FELLOWS, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Michigan.

MOTION BY PLAINTIFF IN ERROR TO ADVANCE.

EDWARD S. CLARK,
(BAY CITY, MICHIGAN)
Attorney for Plaintiff in Error.

In the

Supreme Court of the United States

October Term, 1916.

No. 764.

FIRST NATIONAL BANK OF BAY CITY, MICHIGAN, PLAINTIFF IN ERROR,

v.

GRANT FELLOWS, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Michigan.

MOTION BY PLAINTIFF IN ERROR TO ADVANCE.

Comes now the plaintiff in error by its counsel and respectfully moves the Court to advance this case for argument on a day during the present term convenient to the Court.

In quo warranto proceedings instituted by the Attorney General of the State of Michigan on the relation of certain trust companies, the plaintiff in error was enjoined and excluded from acting as trustee, executor, administrator and registrar of stocks and bonds under authority of sub-section (k), Section 11, of the Act approved December 23, 1913, known as the Federal Reserve Act, on the ground that Con-

gress had exceeded its constitutional powers in granting to national banks the right to act in the capacities mentioned.

This decision will prohibit all national banks in the State of Michigan from exercising the powers in question, and in view of this and a similar decision by the Supreme Court of the State of Illinois in the case of People ex. rel. First National Bank of Joliet v. Auditor of Public Accounts, in which the Act in question was declared unconstitutional, national banks throughout the United States, numbering more than seventy-five hundred, pending a decision by this Court, will be prevented by the doubt raised as to the constitutionality of the Act from freely exercising the powers granted them by Congress. It is, therefore, a matter of great public importance that the determination of this question should be expedited, to the end that the corporate powers of national banks created and used by the United States Government in the conduct of its fiscal affairs may be definitely determined.

Opposing counsel concur in this motion.

Edward F Clark.

Attorney for Plaintiff in Error.

Office Supreme Court, U. S.
FEB 28 1917
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 764

FIRST NATIONAL BANK OF BAY CITY, MICHIGAN,
PLAINTIFF IN ERROR.

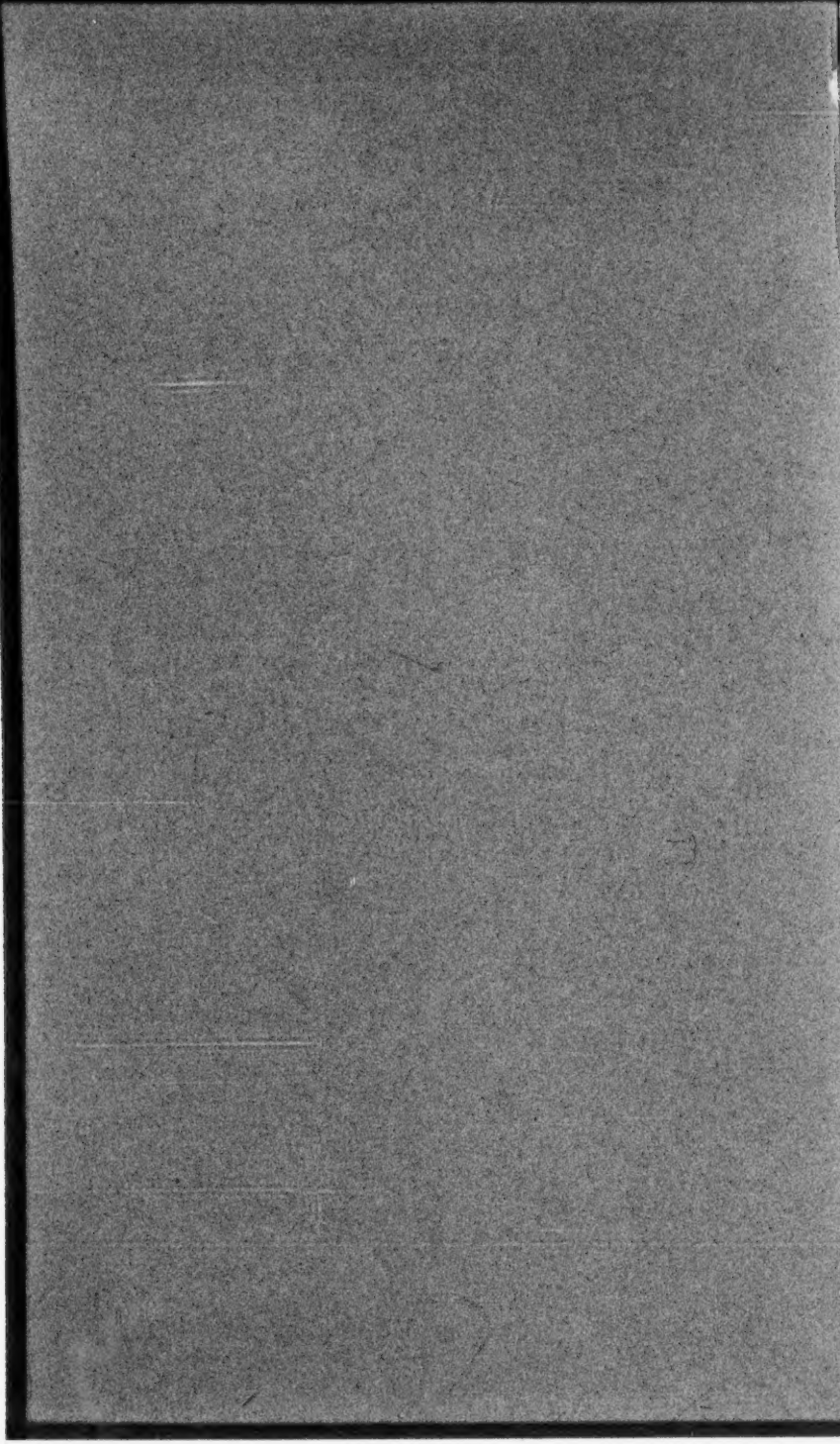
vs.

GRANT FELLOWS, ATTORNEY-GENERAL OF THE STATE OF MICHIGAN, ON THE RELATION OF UNION TRUST COMPANY, ET AL.

In Error to the Supreme Court of the State of Michigan.

BRIEF FOR DEFENDANT IN ERROR.

HENRY M. CAMPBELL,
Detroit,
JOHN G. JOHNSON,
Philadelphia,
Counsel for Defendant in Error.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 764

FIRST NATIONAL BANK OF BAY CITY, MICHIGAN, PLAINTIFF IN ERROR.

vs.

GRANT FELLOWS, ATTORNEY-GENERAL OF THE STATE OF MICHIGAN, ON THE RELATION OF UNION TRUST COMPANY, ET AL.

BRIEF FOR DEFENDANT IN ERROR.

The present proceeding was brought by the Attorney-General of Michigan, by information in the Supreme Court, on the relation of all of the trust companies doing business in that State, to test the validity of Section 11 (k) of the Federal Reserve Act (Sec. 9794 U. S. Comp. Stat. 1913).

The case was heard upon the information, plea and demurrer to the plea. The Federal Reserve Board, upon leave granted, appeared by its counsel, filed a brief and made an argument upon the hearing before the Michigan Supreme Court.

The facts involved are undisputed, and are as follows:

Prior to the passage of the Federal Reserve Act, national banks were only authorized to do a commercial business, and their powers were carefully and minutely set forth in the act as follows:

> "(7) To exercise, by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security, and by obtaining, issuing and circulating notes according to the provisions of this title."
>
> (*U. S. Comp. Stats.* 1913, *Sec.* 9661.)

The legal justification for the existence of national banks, as will be more fully pointed out hereafter, is that primarily they are instruments of the Federal Government, created for public purposes, as a necessary and proper means for executing the powers conferred upon Congress by the Constitution. The right to transact a private commercial business is recognized as incidental only, being one of the necessary features of a bank, without which it could not perform its public functions—an implication not to be extended beyond what necessity and the public interest demand.

The avowed purpose of the Federal Reserve Act, as expressed in its title, is strictly within the limitations above stated. The title is as follows:

> "An act to provide for the establishment of Federal Reserve banks, to furnish an elastic currency, to afford means of rediscounting commercial paper, to establish a more effective supervision of banking in the United States, and for other purposes."

With the single exception of Section 11 (k), the provisions of this act accord with the title and relate solely to commercial banking. Section 11 (k) was injected into the act at the "eleventh hour," practically without discussion in either house of Congress, and has no relation whatever to any of the other subjects treated in the act. It reads as follows:

> "The Federal Reserve Board shall be authorized and empowered * * *

(k) To grant, by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator or registrar of stocks and bonds, under such rules and regulations as the said board may prescribe."

There is nothing in the act expressly conferring upon all national banks the right to exercise the powers stated in the section, and no attempt is made in the act itself to regulate in any manner whatsoever the exercise of the powers, if granted. The whole subject, by this brief section, is committed to the unlimited and unrestrained discretion of the Federal Reserve Board, without rule or guidance.

The Federal Reserve Board by special permit granted to the plaintiff in error, the First National Bank of Bay City, Michigan, the right to act as trustee, executor, administrator and registrar of stocks and bonds. The Attorney General of the State filed an information against the bank contending that the section was void upon three grounds: (a) That Congress was not authorized to confer upon national banks the powers specified in the section; (b) That if Congress possessed the power it could not delegate its exercise to the Federal Reserve Board, and (c) That the granting of the powers specified is in contravention of the State and local law.

The Michigan Supreme Court sustained the contention of the Attorney General, and entered a judgment of ouster against the respondent, the First National Bank of Bay City, prohibiting the exercise of the fiduciary powers specified in Section 11 (k). All of the eight judges concurred in holding that Congress exceeded its constitutional powers in granting to the bank the right to act as trustee, executor, administrator and registrar of stocks and bonds. Justice Brooke also held that the action of the Board was in contravention of the State and local law.

Two questions are presented by this appeal:

First. Is Congress authorized, under the Federal Constitution, to confer upon national banks the right to act as trustee, executor, administrator and registrar of stocks and bonds?

Second: If Congress itself possesses such power, can it delegate its authority to grant such rights to the Federal Reserve Board?

POINT I.

Congress is not Authorized by the Constitution to Confer Upon National Banks the Corporate Powers Specified in Section 11 (k).

(a) *The United States Government is one of limited powers, and Congress possesses only such powers as are expressly enumerated and such incidental or implied powers as are necessary to give effect to the powers expressly conferred upon it. This proposition has been recognized since the foundation of the Government.*

> "This government is acknowledged by all to be one of enumerated powers. The principle that it can only exercise the powers granted to it would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was pending before the people, found it necessary to urge. That principle is now universally admitted."
> *McCulloch vs. State of Maryland*, 4 *Wheat.* 316; *Marshall, C. J.*

> "The government, then, of the United States can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication."
> *Martin vs. Hunter's Lessee*, 1 *Wheat.* 304; *Story, J.*

> "The government of the United States is one of delegated, limited and enumerated powers. *Martin vs. Hunter's Lessee*, 1 *Wheat.* 304; *McCulloch vs. State of Maryland*, 4 *id.* 316; *Gibbons vs. Ogden*, 9 *id.* 1. Therefore, every valid act of Congress must find in the constitution some warrant for its passage. This is apparent by reference to the following provisions of the constitution: Section 1 of the first article declares that all legislative powers granted by the constitution shall be vested in the Congress of the United States. Section 8 of the same article

enumerates the powers granted to the Congress, and concludes the enumeration with a grant of power 'to make all laws which shall be necessary and proper to carry into execution the foregoing powers and all other powers vested by the constitution in the government of the United States, or in any department or officer thereof.' Article X. of the amendments to the constitution declares that 'the powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.'

Mr. Justice Story, in his commentaries on the Constitution, says: 'Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is whether the power be expressed in the constitution. If it be, the question is decided. If it be not expressed, the next inquiry must be whether it is properly an incident to an express power and necessary to its execution. If it be, then it may be exercised by Congress; if not, Congress cannot exercise it.'"

U. S. vs. Harris, 106 *U. S.* 635.

See also:

Kansas vs. Colorado, 206 *U. S.* 46, 82, 87.

(b) *The Federal Constitution does not expressly authorize Congress to create corporations for any purpose. Congress has, however, implied authority to create them, as an appropriate means of executing powers of government expressly granted. Beyond this the authority does not extend.*

"Among the enumerated powers we do not find that of establishing a bank or creating a corporation. * * * The power of creating a corporation, though appertaining to sovereignty, is not like the power of making war or levying taxes or regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished."

McCulloch vs. Maryland, 4 *Wheat.* 377, 379.

"The bank is not considered as a private corporation, whose principal object is individual trade and

> individual profit; but as a public corporation, created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government, is admitted; but the bank is not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that Congress could create such a corporation. The whole opinion of the Court, in the case of *McCulloch vs. State of Maryland*, is founded on and sustained by the idea that the bank is an instrument which is necessary and proper for carrying into effect the powers vested in the government of the United States."
>
> *Osborn vs. Bank of U. S.*, 9 *Wheat.* 738 (*Marshall, C. J.*).

A similar view of the nature of banks organized under the national banking laws has been frequently expressed by the Supreme Court of the United States.

> "National banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service, through means appropriate to that end."
>
> *Farmers' Nat. Bank vs. Deering*, 91 *U. S.* 29.

> "National banks are instrumentalities of the Federal Government created for a public purpose."
>
> *Davis vs. Elmira Sav. Bank*, 161 *U. S.* 283 (*White, C. J.*).

To the same effect see:

> *Luxton vs. North River Bridge Co.*, 153 *U. S.* 529.
> *McClellan vs. Chipman*, 164 *U. S.* 357.

That such was the view of the framers of the Federal Constitution is apparent from the following contemporary opinion by Alexander Hamilton:

> "It is conceded that implied powers are to be considered as delegated, equally with express ones. Then it follows that as the power of erecting a corporation may be as well implied as any other thing, it may as well be employed as an instrument or mean of carry-

ing into execution any of the specified powers, as any other instrument or mean whatever. The only question must be, in this, as in every other case, whether the mean to be employed, or in this instance the corporation to be erected, has a natural relation to any of the acknowledged objects or lawful ends of the government. Thus a corporation may not be erected by Congress for superintending the police of the City of Philadelphia, because they are not authorized to regulate the police of that city. But one may be erected in relation to the collection of taxes, or to the trade with foreign countries, or to the trade between the States, or with the Indian tribes; because it is the province of the Federal Government to regulate those objects, and because it is incident to a general sovereign or legislative power to regulate a thing, to employ all the means which relate to its regulation to the best and greatest advantage."

26 *Harvard Law Review*, 672.

(c) *It is conceded that there is no express power in Congress to grant the rights specified in Section* 11 (k), *but plaintiff in error contends that an implied power exists upon one of two alternative theories as follows:*

> *"A. By recognizing it as the exercise by Congress of powers not previously defined, but necessarily and properly exercised to meet modern conditions."*
>
> *"B. By treating it as a mere administrative detail connected with the exercise of powers which are already clearly defined."*

Theory A. According to this theory it is contended that Congress has power to create any type of corporation it pleases, with such powers as it may choose to confer, provided only that in the opinion of Congress to do so would promote the interests of the Federal Government.

If this be true, Congress can create an independent corporation with no other power than to act as executor or administrator, and whose sole business would be to administer estates, notwithstanding the fact that it is well settled by this Court that the states have exclusive jurisdiction over such matters,—provided only that in the opinion of Con-

gress the interests of the Federal Government would thereby be promoted.

The statement of the proposition is its best refutation. If the only limit upon the powers of Congress is its own discretion, the idea that the Federal Government is a government of limited powers is a delusion.

The counsel for plaintiff in error do not appear, however, to be particularly enthusiastic over this proposition, and prefer to rely upon theory B.

Theory B. The doctrine of implied powers is one capable of endless abuse. Unless some rule is recognized which controls its application, it is liable to degenerate into an absolute discretion usurped by a legislative body of limited powers. The growing tendency of Congress to ignore constitutional limitations emphasizes the importance of insisting upon the enforcement of the rules which this Court has declared respecting such matters.

Mr. Justice Story has declared the rule applicable in such cases, which is quoted with approval in *U. S. vs. Harris,* 106 *U. S.* 636, as follows:

> "Mr. Justice Story, in his commentaries on the Constitution, says: 'Whenever, therefore, a question arises concerning the constitutionality of a particular power, the first question is whether the power be expressed in the Constitution. If it be, the question is decided. If it be not expressed, *the next inquiry must be whether it is properly an incident to an express power and necessary to its execution.* If it be, then it may be exercised by Congress; if not, Congress cannot exercise it."

Following this rule, Congress can only confer upon national banks such additional powers as are properly incidental to the exercise of their functions, as agencies of the Federal Government and necessary for that purpose.

No one will contend that the right to act as trustee, executor, administrator or registrar of stocks and bonds, is in any sense necessary or even appropriate to the fiscal operations of the Federal Government, and unless this rule, which, up to the present time, stands unchallenged, is to be repudiated, Congress has no authority to adopt Section 11(k).

Appellant, however, seeks to evade the application of this rule by claiming that "as soon as the implied power is defined and confirmed by the decisions of this Court it becomes in effect an express power" (Clark's brief, p. 11). Therefore, by a further implication, Congress may confer, in its discretion, any additional power incidental to the implied powers thus recognized and necessary to their execution—and it might as well be added, and so on, *ad infinitum*. A method of reasoning which, if carried out to its logical conclusion, would dispense with all limitation upon the power of Congress.

In pursuance of this claim, it is contended that Congress may confer these powers upon national banks as an incident to the successful prosecution of their private business *as banks*. But even if the rule extended thus far, the granting of the right to act as trustee, executor, administrator or registrar of stocks and bonds is in no sense necessary or appropriate to the exercise of banking powers. The distinction between banking and acting as trustee is fundamental. In the case of the bank the relation between it and its depositor is that of debtor and creditor. The depositor, in effect, agrees that his money shall pass to the bank and become its own to be used by the latter for its own profit. The obligation of the bank is an absolute one to repay the amount of money deposited, and the depositor is not concerned in the investment of the moneys which the bank may make. On the other hand, the relation of the trustee and the *cestui que trust* is precisely the reverse. Only the technical title and control of the trust property is vested in the trustee. Equitably and beneficially the property belongs to the *cestui que trust*. The trustee cannot use the trust property for his own profit or mingle the trust funds with his own or with other trust funds. His obligation is to hold and account for the particular property for the benefit of the *cestui que trust*. If, after exercising reasonable judgment, a loss occurs, it falls upon the trust fund, and not upon the trustee. The bank must repay its depositor in any event.

There is a growing tendency throughout the country to regulate and safeguard the exercise of fiduciary powers. In Michigan, as in a number of other States, the same corporation is not permitted to exercise both classes of powers. In those States where corporations are permitted to exercise both, it is quite generally recognized that trust properties should not be subjected to the hazards and liabilities of a

banking business, and the exercise of fiduciary powers is so restricted and the business so safeguarded and segregated, as in effect, to create two separate corporations, having separate and distinct functions.* It would be as great a breach of trust for such corporation to utilize its trust properties to promote its banking business as it would be to do the same thing with the properties of an independent trust company which might come under its control.

The most that could be gained by the addition of the fiduciary powers, when properly administered, would be such profits as might result from the employment of them. If this is a sufficient ground for an extension of powers, there would be much greater reason for granting to the banks authority to manufacture automobiles or engage in any other more profitable business, so as to realize greater profits.

It is contended in support of this attempt to usurp an authority not belonging to Congress that national banks are brought into competition with state banks, which exercise fiduciary as well as banking powers, and that unless national banks are permitted to exercise like powers, they will not realize the profits which they otherwise might.

A moment's consideration will show, however, that this idea of competition is merely a pretense upon which to hang the claim for additional powers—powers which Congress has no right to confer and which belong exclusively to the States. The state banks which may be said to compete with national banks have no greater or different banking powers than the national banks themselves, and any competition between them must necessarily be confined to competition in banking, where both classes stand upon an equal footing. The State, having plenary powers, may permit banking powers and fiduciary powers to be exercised by the same corporation, but Congress, having limited powers, and having only authority (and that by implication) to confer banking powers, cannot ignore constitutional restrictions and assume the unlimited powers of the State.

(*) As illustrating this point, the Tennessee statute which permits banks to exercise both classes of powers provides: (Shannon's Supplement of 1903, p. 525, Sec. 6)

"None of the property, means, effects, funds, assets, or any other thing held by such bank as executor, administrator, guardian, receiver, commissioner, assignee, trustee, agent or attorney in fact shall be assumed, counted, or taken into consideration as assets or liabilities of said bank in making the statement required by law to be published of and concerning the affairs, business and conditions of said bank."

The excuse for competition vanishes entirely when it is proposed to grant fiduciary powers to national banks in Michigan to enable them to compete with state banks, as state banks in Michigan are not permitted to exercise fiduciary powers.

(d) *Trust companies are not instrumentalities of the Federal Government; their functions are purely private, and they are, therefore, subject to the exclusive jurisdiction and control of the State.*

The distinction between banks and trust companies under the laws of the State of New York was considered in *Mercantile Bank vs. N. Y.*, 121 *U. S.* 159, in which Mr. Justice Matthews says:

> "Trust companies, however, in New York, according to powers conferred upon them by their charters and habitually exercised, are not in any proper sense of the word, banking institutions. They have the following powers: To receive moneys in trust and to accumulate the same at an agreed rate of interest, to accept and execute all trusts of every description committed to them by any person or corporation or any court of record, to receive title to real or personal estate on trusts created in accordance with the laws of the State, and to execute such trusts, to act as agent for corporations in reference to issuing, registering and transferring certificates of stock, bonds and other evidences of debt, to accept and execute trusts for married women in respect to their separate property, and to act as guardian for the estates of infants. * * *
>
> It is evident from this enumeration of powers that trust companies are not banks in the commercial sense of that word, and do not perform the functions of banks in carrying on the exchanges of commerce."

In *Jenkins vs. Neff*, 186 *U. S.* 237, it is said:

> "Trust companies are not organized primarily for banking purposes; they are designed for other purposes, as pointed out in the *Mercantile Bank* case, and it never was the purpose of the Federal Government to interfere with the policy of the State in reference to the formation and development of such corporations as it should judge expedient, even though

> it should be found necessary to invest them with some of the powers of banking associations as an inducement to perform the other duties and obligations imposed by the State."

Under the Michigan law the powers of trust companies are substantially the same as those under consideration in the New York cases above cited; and the distinction between banks and trust companies is further emphasized in Michigan by a specific provision of the Trust Company Act, as follows:

> "But nothing herein contained shall be construed as giving the right to issue bills to circulate as money or to buy or sell bank exchange or do a general banking business."
>
> 3 *Howell's Stats., 2nd Ed., Sec.* 6484.

Trust companies are also recognized as being distinct from banks in Article XII., Section 9, of the Michigan Constitution of 1908, as follows:

> "No general law providing for the incorporation of *trust companies* or *corporations for banking purposes* or regulating the business thereof shall be adopted, amended or repealed except by a vote of two-thirds of the members of each house of the legislature."

(e) *It is well settled that a State has exclusive jurisdiction and authority over persons and property within its borders.*

The tenth amendment to the Federal Constitution is as follows:

> "The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States, respectively, or to the people."

In the leading case of *Penoyer vs. Neff*, 95 *U. S.* 722, Mr. Justice Field says:

> "The several States of the Union are not, it is true, in every respect independent; many of the rights and powers which originally belonged to them being now vested in the government created by the constitution;

but except as restrained and limited by that instrument, they possess and exercise the authority of independent states, and the principles of public law to which we have referred are applicable to them. *One of these principles is that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.* As a consequence, every State has the power to determine for itself the civil status and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, and the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced, and also to regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed and transferred."

This principle has been frequently affirmed by this Court.

Overby vs. Gordon, 177 *U. S.* 214, 222.
Brown vs. Fletcher's Estate, 210 *U. S.* 82, 89.
U. S. vs. Fox, 94 *U. S.* 320.
Mich. Trust Co. vs. Ferry, 228 *U. S.* 353.

The right of the State to exclusive jurisdiction over property within the State has also been established by the Michigan Courts.

Dickinson vs. Seaver, 44 *Mich.* 624.
Lafferty vs. Peoples Sav. Bank, 76 *Mich.* 35.
American Missionary Assn. vs. Hall, 138 *Mich.* 247.

The creation and management of trusts, the administration of estates and the acting as registrar of stocks and bonds are all peculiarly matters for State regulation. They relate exclusively to private rights, and have nothing whatever to do with the affairs of the Federal Government. For Congress to attempt to control or regulate such matters is to invade the sovereignty of the State assured by the tenth amendment.

(f) *Even consent on the part of a State Legislature permitting Congress to exercise dominion over the subjects included in Section* 11 (k) *would not be effective.*

A State, because of its plenary control, may authorize a trust company to engage in banking, in addition to conducting the usual trust business, or a State bank to exercise trust powers, but a State Legislature has no power to change a status established by both the State and Federal Constitutions, by consenting that Congress may trespass upon the exclusive jurisdiction of the State over the subjects under consideration, neither can it grant to Congress powers not conferred upon that body by the Federal Constitution. It is elementary that where jurisdiction over the subject matter is withheld by law parties can not create or confer it by consent. The powers and functions sought to be covered by section 11 (k) are reserved to the States and neither expressly nor by implication delegated to the Federal Government. Consent can not change this unless it be given in a constitutional amendment enacted as the constitution provides.

POINT II.

Neither Congress Nor the State Has Prescribed the Laws Under Which a National Bank May Act as Trustee, Executor, Administrator or Registrar of Stocks and Bonds.

It is obvious that there must be some laws under which these fiduciary powers, if granted, are to be exercised.

(a) *Congress, in the National Banking Act and the Federal Reserve Act, has provided rules and regulations, in minute detail, for the exercise of all of the banking powers conferred upon national banks by those acts. It has prescribed nothing respecting the fiduciary powers contained in Section* 11 (*k*).

If the fiduciary powers under consideration were incidental to the banking powers exercised by national banks, it would be imperative for Congress to pass laws regulating their administration. This would necessitate a body of laws

defining and regulating trusts, providing for the descent of property of deceased persons, fixing the status of stocks and bonds and regulating their issue.

It is not the province of the State to prescribe how the powers of national banks shall be exercised. Congress alone can pass the laws required for such purpose.

First Nat. Bank vs. Converse, 200 *U. S.* 425.

(b) *On the other hand, the State, having exclusive jurisdiction over all of the subjects included in the section under consideration, has expressly asserted its authority over each of them as follows:*

(1) The State laws define and regulate trusts and prescribe how, when and to what extent they shall be administered.

Howell's Stats., 2nd Ed., Chap. 285.

(2) The State laws provide for the descent of property of deceased persons, both real and personal, how the property shall be administered and by whom. (*H. S. Chaps.* 290 to 301, *inclusive.*) The probate court is expressly vested with authority to appoint administrators in the case of intestate estates (*H. S. Sec.* 11039); and to grant letters testamentary to an executor named by will "if he is legally competent." (*H. S. Sec.* 11026.)

The probate court is thus charged with the duty of determining the competency of every person appointed either as executor or administrator.

The exclusive jurisdiction of the State over these matters has been expressly declared by the Supreme Court of the State.

Dickinson vs. Seaver, 44 *Mich.* 624.
Lafferty vs. Peoples Sav. Bank, 76 *Mich.* 35.
American Missionary Assn. vs. Hall, 138 *Mich.* 247.
Brown vs. Fletcher's Estate, 146 *Mich.* 401.

And such ruling has been approved, on appeal, by this Court.

Brown vs. Fletcher, 210 *U. S.* 82-89.

(3) The State laws in numerous cases fix the status of shares of stock and prescribe how they may be transferred;

and in the case of public service corporations, such as railroads, street railways and other common carriers, telephone and telegraph companies and companies furnishing light, heat, water, or mechanical power to the public, the issue of stocks and bonds is regulated by law and the Michigan Railroad Commission is vested with jurisdiction over the subject.

H. S., 2nd Ed., Sec. 9610.

No corporation has ever been authorized by the Michigan laws to administer trusts or to act as executor or administrator, except under acts specially adapted to such purposes and containing safeguards to insure the public against an improper exercise of the powers conferred. All such acts have now been merged in the present Trust Company Act (3 *H. S., 2nd Ed., Sec.* 6476); and no Michigan corporation, except when organized under this act, can lawfully act as trustee, executor or administrator. The act is a very comprehensive one, and contains many provisions which would be inapplicable to national banks and unenforceable against them. It requires a minimum capital of $300,000, except in cities of less than 100,000 inhabitants, in which case the minimum capital is $150,000; 50 per cent of the capital must be paid in, and the certificate of the Banking Commissioner of the State is required before the company can begin business. Not less than 50 per cent of the capital, provided said amount is not in excess of $200,000.00, must be invested in prescribed securities and deposited with the State Treasurer, as security for depositors and creditors. Included in such prescribed securities are notes and mortgages on unincumbered real estate within the State of Michigan, worth double the amount secured, which securities national banks are not authorized to hold. The act fixes the number and qualifications of directors and imposes penalties for fraud, embezzlement, etc. It regulates the investments of the corporation and authorizes a lien in certain cases and imposes a double liability upon the stockholders. Corporations organized under the act are subject to complete supervision by the State Banking Commissioner. Quarterly and special reports are required, and penalties of various kinds are imposed. A method of winding up such corporations is prescribed, including the power of appointment of a receiver; and in many other ways the act prescribes in detail how the business shall be conducted; a great part of the requirements being such as could not be complied with by a national bank.

The various laws upon these subjects constitute a large and important part of the general laws of the State.

(c) *None of these laws, however, can apply to national banks.*

A defaulting trustee, if a national bank, can not be punished under a State law. An executor or administrator misappropriating the estate in its hands or making a wrongful distribution of the assets can not be made to account in a State Court, and no other tribunal exists with jurisdiction in such a case. A double liability could not be imposed upon the stockholders of a national bank, although the stockholders of a Michigan trust company would be subject to such penalty in an appropriate case.

It is well settled that no power exists in a State to coerce a national bank, or to compel it to obey the State laws. This has been repeatedly declared by this Court.

The creation and regulation of national banks belong exclusively to the United States.

> "The charter of incorporation (of a national bank) not only creates it, but gives it every faculty which it possesses; the power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit which is not authorized by the law of the United States. It is not only itself the mere creature of the law, but all its actions and all its rights are dependent on the same law."
>
> *Osborn vs. Bank*, 9 *Wheat.* 823.

> "It is well settled that the United States statutes relative to national banks constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers, except those expressly granted or which are incidental to carrying on the business for which they are established."
>
> *First Nat. Bank vs. Converse*, 200 *U. S.* 438.
>
> *California Nat. Bank vs. Kennedy*, 167 *U. S.* 362, and cases cited.

Exclusive control of national banks by the Federal Government is impossible if section 11 (k) is sustained. By its terms the fiduciary powers may be granted by special permit *"when not in contravention of State or local law."* Each State may thus decide for itself the extent of the powers which national banks may exercise within its borders. In other words, "State legislation, if permitted, might impose limitations and restrictions as various and as numerous as the States" (188 U. S. 229).

The section goes still further and authorizes the Federal Reserve Board to discriminate among national banks in the same State by special permit. The Board may in its discretion (which is not subject to review) and has in many instances granted full power to some banks, more restricted powers to others in the same State, and has refused other applications altogether.

Under such conditions uniformity in the system or exclusive control by the Federal Government is impossible.

In *Eaton vs. Iowa*, 188 *U. S.* 229, a question was presented whether a State could pass laws punishing offenses of officers and employes of banks organized and operating under the laws of the United States. Mr. Justice Shiras, in deciding that the States possessed no such power, said:

> "We think this view of the subject (that national banks are organized and their business prosecuted for private gain) is not based on a correct conception of the federal legislation creating and regulating national banks. That legislation has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of State legislation, which if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the States. Having due regard to the national character and purposes of that system, we cannot concur in the suggestion that national banks, in respect to the powers conferred upon them, are to be viewed as solely organized and operated for private gain. The principles enunciated in *McCulloch vs. Maryland*, 4 *Wheat.* 316, 425, and in *Osborn vs. U. S. Bank*, 9 *Wheat.* 738, though expressed in respect to banks incorporated directly

by acts of Congress, are yet applicable to the later and present system of national banks."

Christopher vs. Norvell, 201 *U. S.* 225.
Yates vs. Jones Nat. Bank, 206 *U. S.* 178.
People vs. Fonda, 62 *Mich.* 401.

The conclusion is inevitable, that there are no laws, which national banks upon which these fiduciary powers may be conferred, can be compelled to obey in the administration of them.

It must also be conceded that no legislative body can confer either upon corporations or individuals powers affecting private rights, to be exercised according to the will of the grantee and without restriction. Our government is a government of laws, and not of men.

POINT III.

Even if Congress Possesses the Power to Legislate Concerning the Subjects Included in Section 11(k), it can not Delegate that Power to the Federal Reserve Board.

If, as already pointed out, the subjects under consideration are beyond the jurisdiction of Congress, that body can not confer upon the Federal Reserve Board a power which it does not itself posses. But, conceding, *arguendo*, that Congress might take cognizance of these matters, its legislative power over them must be exercised by itself alone.

(a) *The general principle is well settled that legislative powers cannot be delegated.*

Article I., Section 1, of the Constitution of the United States, provides:

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

> "One of the settled maxims in constitutional law is that the power conferred upon the Legislature to make laws cannot be delegated by that department

to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain, and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom and patriotism this high prerogative has been entrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall devolve, nor can it substitute the judgment, wisdom or patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust."
Cooley Constitutional Limitations, 6 *Ed.,* 137.

In the leading case of *Field vs. Clark,* 143 *U. S.* 694, it is said:

"The Legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make its own action depend."

The ruling in this case has been followed in all of the later cases in this Court where the question has arisen.

St. Louis Consolidated Coal Co. vs. Illinois, 185 *U. S.* 210.
Buttfield vs. Stranahan, 192 *U. S.* 470.
Union Bridge Co. vs. U. S., 204 *U. S.* 364, 385.
U. S. vs. Grimaud, 220 *U. S.* 506.
Red "C" Oil Co. vs. North Carolina, 222 *U. S.* 394.
Interstate Com. Com'n vs. Transit Co., 224 *U. S.* 214.

The distinction is well stated by Ranney, J., in *Cincinnati, Etc., R. R. Co. vs. Commissioners of Clinton Co.,* 1 *Ohio St. R.* 88, as follows:

"The true distinction is between the delegation of of power to make the law, which necessarily involves a discretion as to what it shall be and the conferring of authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done. To the latter no valid objection can be made."

This distinction is illustrated by a comparison between the laws of Michigan and Minnesota relative to the issuing of stock by railroad companies.

The Michigan Statute (Sec. 9610 H. S., 2nd Ed.) prescribes the terms, conditions and limitations under which stock can be issued, and the Michigan Railroad Commission is authorized to make inquiry as to whether in fact a railroad company desiring to issue stock has complied with the law, in which event the Commission " shall grant authority to make the issue applied for."

Unlike Michigan, the Minnesota Legislature has never enacted any terms, conditions or limitations with reference to the increase of capital stock by railroad companies, but Sec. 2872 of the Revised Laws of 1905 provides:

> "Before any railroad corporation shall increase its capital stock it shall apply to the Railroad and Warehouse Commission, in writing, setting forth the amount of the proposed increase and the purpose for which it is desired. The commission shall thereupon fix a time and place for hearing the application and require such notice thereof to be given as they may deem reasonable. Upon the hearing the commission shall make findings of the facts established in reference to the proposed increase, and, if they allow it, shall prescribe the manner in which and the terms upon which the same shall be made. If they disapprove such increase, the reasons therefor shall be stated in their next annual report. No capital stock shall be issued by any railway corporation until the full amount thereof has been paid to the corporation in money, labor or materials actually used in the construction of its road, nor shall the capital stock of any such corporation be increased except by special authority of such Railroad and Warehouse Commission."

The authority thus attempted to be given to the Minnesota Railroad and Warehouse Commission is identical in character with that which Congress has sought to confer upon the Federal Reserve Board, which reads as follows:

> "The Federal Reserve Board shall be authorized and empowered * * *
>
> (k) To grant, by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator or registrar of stocks and bonds, under such rules and regulations as the said Board may prescribe."

The constitutionality of the Minnesota law arose in the case of *State vs. Great Northern Ry. Co.*, 100 *Minn.* 445. The Great Northern Railway increased its capital stock without applying to the Railroad and Warehouse Commission for authority to do so, and the State attempted to enjoin the Railway Company from issuing such increased stock until authority had been granted by the Commission. The Supreme Court, in denying the injunction, among other things, said:

> "The terms and conditions upon which railway corporations may be created, the powers and capital stock they may have, the purposes for which they may increase their capital stock, and the limitations and conditions to be imposed upon the right to such increase are exclusively matters for legislative action, which cannot be delegated. The State having created such corporations and conferred upon them for public purposes great and extraordinary powers and franchises, including the sovereign power of eminent domain and the right to levy tolls or taxes upon all who use for traffic or travel the modern highways, the railroads, it logically follows that the Legislature has the undoubted right to enact statutes regulating the increase and disposition of their capital stock.
>
> In the exercise of this right it may pass a statute providing generally for what purposes and upon what terms, conditions and limitations an increase of capital stock may be made, and confer upon the commismission the administrative duty of supervising any proposed increase of stock. It may also delegate to the commission the duty of finding the facts in each particular case, and authorize and require it, if it find the existence of facts that bring the case within the statute, to allow the proposed increase; otherwise, to refuse it. *Any statute, however, which attempts to authorize the commission in its judgment to allow an increase of the capital stock of a corporation for such purpose and on such terms or conditions as it may deem advisable, would be a delegation of legislative power and void.*"

The whole subject has been comprehensively treated by the Michigan Supreme Court and the principles above stated approved in the case of *King vs. Concordia Fire Ins. Co.*, 140 *Mich.* 258-267.

(b) *By the terms of this section, complete authority over the subject has been delegated to the Federal Reserve Board.*

There is nothing in the section or in the other parts of the act which indicates any intention on the part of Congress itself to grant any additional powers to national banks. Under the National Banking Act Congress was very careful to specify, in detail, the powers which it intended to confer upon the banks, and if it had been the intention of Congress to itself grant additional powers to all national banks, language apt for that purpose would have been used, instead of that which appears in Section 11 (k). By this section it is expressly provided that the *Federal Reserve Board,* not Congress, shall have power "*to grant, by special permit, to national banks applying therefor, when not in contravention of state or local law, the right to act,*" etc. There can be but one meaning attributed to this language. No powers are to be conferred upon any national bank until the Federal Reserve Board has determined, *first,* whether to grant such powers would contravene a state or local law; *second,* what powers shall be conferred upon each particular bank; and *third,* under what rules and regulations the powers granted shall be exercised. It rests entirely with the Federal Reserve Board, and not with Congress, to grant, by special permit, to such banks as it may determine, the right to exercise such powers as the Board is pleased to confer.

In practice the Board has granted greater powers to some banks than it has to others. To some it has granted full powers to act as trustee, executor, administrator and registrar of stocks and bonds; to others lesser rights, as follows: Trustee, executor and administrator; trustee and registrar of stocks and bonds; trustee alone; and registrar of stocks and bonds alone.

The language used is not honestly susceptible of the construction, which some have attempted to put upon it, that Congress has by the passage of that section expressly conferred upon all national banks the powers stated in the section. It rests in the discretion of the Federal Reserve Board to determine what powers may be exercised by particular banks and what limitations or restrictions shall be placed upon the exercise of such powers.

(c) *The Federal Reserve Board exercises legislative power when it grants to a national bank, by special permit, the right to act as trustee, etc.*

Prior to the passage of the Federal Reserve Act national banks could only exercise the corporate powers specified in the National Banking Act. It must be conceded that unless additional powers are conferred upon national banks, it would be *ultra vires* on their part to exercise them. The adoption of the section by Congress is, of itself, a legislative admission to that effect. Only Congress can confer such additional powers. There is no difference in this respect between creating a corporation with specified powers and the granting of additional powers to a corporation already in existence. No one will contend that Congress could delegate to individuals authority to create a corporation and endow it with corporate powers. This being true, it is equally clear that Congress cannot delegate to the Federal Reserve Board authority to confer upon a particular bank powers which it does not otherwise possess. By the express provisions of the section, it is the Federal Reserve Board which is to grant the right to act. The discretion which is to be exercised is that of the Federal Reserve Board, not that of Congress. It is the Federal Reserve Board which is to determine, by special permit, what powers shall be conferred upon particular banks, the extent of them and in what manner they shall be exercised. This discretion is legislative in character. There is a sharp line of distinction between such action and the making of administrative rules for the determination of facts upon which the right to exercise powers granted by legislative authority may depend.

Field vs. Clark, 143 *U. S.* 694.
U. S. vs. Grimaud, 220 *U. S.* 520.

(d) *The Federal Reserve Board has adopted rules and regulations and has issued instructions to its agents prescribing how applications for trustee powers shall be made and directing that funds, securities and investments shall be kept in separate departments, copies of which are appended to this brief. No attempt is made to prescribe the laws in accordance with which the powers must be exercised.*

According to these rules and regulations, the granting

of special permits is a matter of grace and favor on the part of the Federal Reserve Board. No bank, however worthy or well qualified, is entitled of right to be granted the powers specified in the section. If the examiners think "that the directors do not direct or are lax or negligent in their attendance at board meetings, or in giving attention to the bank's management and direction," the Federal Reserve Board will not "as a rule" grant the right to act to such bank. The same is true in cases where the Federal Reserve agents report that the management is not strong "from a moral standpoint," or where such agents "feel that the officers of the bank, as individuals, would not be worthy of being entrusted with the management of trust funds or the administration of estates." These instructions indicate that the Federal Reserve Board does not even contemplate the exercising of its own discretion in these matters, but intends to rely upon the ex-parte opinions of its agents. Other similar conditions are specified in the instructions of the Board to their agents, failure to comply with which will "as a rule" defeat an application of a bank; but it will be noted that no rules are definitely laid down the observance of which will entitle a qualified bank to the powers, as a matter of right. A truly utopian and parental plan, but one well-calculated to give rise to reflection when it is considered that the members of the Federal Reserve Board, however honest or well-meaning they may be, are not the representatives of the people or chosen by them, but are appointees of the administration and responsible to no one but the power that appoints them.

The right to act once granted by the Federal Reserve Board to a national bank, there is no law, Federal or State, nor even a regulation of the Federal Reserve Board determining in what manner the power so conferred shall be administered. The bank is left to proceed at will, without rule or guidance, and responsible to no one—a ship without rudder, chart or compass—an intolerable condition in a country governed by law.

It is respectfully submitted that the judgment of the Michigan Supreme Court should be affirmed.

HENRY M. CAMPBELL,
JOHN G. JOHNSON,
Counsel for Defendants in Error.

Regulation F, Series of 1916.

FEDERAL RESERVE BOARD.

Washington, Oct. 1, 1916.

NATIONAL BANKS AS EXECUTORS AND TRUSTEES.

I.

Statutory Provisions.

The Federal Reserve Act provides:

"Sec. 11. The Federal Reserve Board shall be authorized and empowered.

"(k) To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds, under such rules and regulations as the said Board may prescribe."

II.

Applications.

1. A national bank desiring to exercise any or all of the privileges authorized by Section 11, subsection (k), of the Federal Reserve Act, shall make application to the Federal Reserve Board on a form approved by said Board (Form No. 61). Such application shall be forwarded by the applying bank to the Chairman of the Board of Directors of the Federal Reserve Bank of its district, and shall thereupon be transmitted to the Federal Reserve Board with his recommendations.

III.

Separate Departments.

Every national bank permitted to act under this section shall establish a separate trust department, and shall place such department under the management of an officer or officers, whose duties shall be prescribed by the board of directors of the bank.

IV.

Provisions for Keeping Trust Funds.

The funds, securities and investments held in each trust shall be held separate and distinct from the general funds and securities of the bank, and separate and distinct one from another. The ledgers and other books kept for the trust department shall be entirely separate and apart from the other books and records of the bank.

V.

Examinations.

Examiners appointed by the Comptroller of the Currency or designated by the Federal Reserve Board will hereafter be instructed to make thorough and complete audits of the cash, securities, accounts and investments of the trust department of every bank at the same time that examination is made of the banking department.

VI.

Conformity with State Laws.

Nothing in these regulations shall be construed to give to a national bank doing business as trustee, executor, administrator, or registrar of stocks and bonds under Section 11 (k) of the Federal Reserve Act any rights or privileges in contravention of the laws of the State in which the bank is located.

VII.

Revocation of Permits.

The Federal Reserve Board reserves the right to revoke permits granted under these regulations in any case where in the opinion of the Board a bank has willfully violated the provisions of these regulations or the laws of any State relating to the operations of such bank when acting as trustee, executor, administrator, or registrar of stocks and bonds.

VIII.

Changes in Rules.

These regulations are subject to change by the Federal Reserve Board; provided, however, that no such change shall prejudice obligations undertaken in good faith under regulations in effect at the time the obligation was assumed.

CHARLES S. HAMLIN,
Governor.

H. PARKER WILLIS,
Secretary.

CIRCULAR LETTER TO FEDERAL RESERVE AGENTS.

Application for Trustee Powers.

By direction of the Board this letter is sent for your guidance in passing upon the applications of national banks for the privilege of exercising the powers of trustee, registrar, executor and administrator.

All applications from applying banks must be transmitted first to the Federal Reserve agent of the district in which the bank is located, who will forward the applications with his recommendations to the Federal Reserve Board. The Federal Reserve agent in making his recommendations is expected to take into consideration the general standing of the bank, character of its management and its fitness to exercise the fiduciary powers applied for, as well as the benefits that the community in which the bank is located will be apt to receive from the exercise of such powers by the bank. Special weight will be given by the Federal Reserve Board to the approval or disaproval of the Federal Reserve

agent. Applications that are recommended by him for approval will be referred by the Board to a committee which, after careful examination of the records on file in the office of the Comptroller of the Currency relating to the business and the management of the bank, will report to the Board favorably or adversely, as the case may be, upon application.

In addition to the points above outlined the Board's committee considers the strength of the bank as shown by its statements and by the examiner's reports, and especial weight is attracted to the observance on the part of the bank of the requirements of law and of the regulations and admonitions which are sent out from time to time by the Comptroller's office.

It is not, as a rule, deemed advisable to grant permits for the exercise of fiduciary powers to a national bank:

(1) Where its surplus does not amount to at least twenty per cent of its capital stock.

(2) Where reports show that it is carrying an excessive amount of past due or doubtful paper.

(3) Where it is carrying real estate loans not authorized by law.

(4) Where it is shown that the bank is in the habit of granting excessive overdrafts continuously.

(5) Where the loans of the bank are not well distributed, by reason of an excessive proportion of the total loans having been granted to a few interests, or where loans made to officers and directors are too large in proportion to the total amount of loans, or are not well secured.

(6) Where the examiners have reported that the directors do not direct or are lax or negligent in their attendance at board meetings or in giving attention to the bank's management and direction.

Federal Reserve agents, in making their recommendations, are expected to pay particular attention to the strength of the management of the bank from a moral standpoint, and should decline to recommend any application where they feel that the officers of the bank, as individuals, would not be worthy of being entrusted with the management of trust funds or the administration of estates.

September 10, 1915.

Federal Reserve Bulletin,
October, 1915, p. 308.

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IN THE

Supreme Court of the United States

October Term, 1916.

No. 764.

FIRST NATIONAL BANK OF BAY CITY, MICHIGAN, PLAINTIFF IN ERROR.

vs.

GRANT FELLOWS, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, ON THE RELATION OF UNION TRUST COMPANY ET AL.

In Error to the Supreme Court of the State of Michigan.

BRIEF FOR PLAINTIFF IN ERROR.

EDWARD S. CLARK,
Attorney for Plaintiff in Error.
H. M. GILLETT,
Of Counsel.

25,594.

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IN THE

Supreme Court of the United States

October Term, 1916.

No. 764.

FIRST NATIONAL BANK OF BAY CITY, PLAINTIFF IN ERROR,

v.

GRANT FELLOWS, ATTORNEY GENERAL OF THE STATE OF MICHIGAN ON THE RELATION OF UNION TRUST COMPANY ET AL.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

The Attorney General of the State of Michigan on the relation of all of the trust companies doing business in that state filed in the Supreme Court of Michigan an information in the nature of a quo warranto for the purpose of testing the validity of Section 11 (k) of the Federal Reserve Act, so-called, by virtue of which the respondent (now plaintiff in error) had obtained a permit from the Federal Reserve Board to act as trustee, executor, administrator and registrar of stocks and bonds. (Rec., pp. 1-4).

The plaintiff in error filed its plea (Rec., pp. 4-10) reciting its incorporation as a national bank and the issuance of a certificate by the Federal Reserve Board. The relators (now defendants in error) demurred to the plea on three grounds. (Rec., p. 11).

> *First,* on the ground that section 11 (k) is unconstitutional "in that Congress is not authorized by the constitution of the United States to confer upon national banks the corporate powers specified in said section."
>
> *Second,* because even if congress itself possessed the right to confer upon national banks the corporate powers specified in section 11 (k), it cannot lawfully delegate such authority to the Federal Reserve Board.
>
> *Third,* because the granting of the corporate powers specified in said section 11 (k) by the Federal Reserve Board to the respondent is in contravention of the laws and policy of Michigan.

Section 11 (k) of the act is as follows:

> "The Federal Reserve Board shall be authorized and empowered * * *
>
> (k) To grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator or registrar of stocks and bonds, under such rules and regulations as the said board may prescribe."

Counsel for the Federal Reserve Board filed a brief and participated in the oral argument by leave of Court.

The decision of the Supreme Court of Michigan was handed down on September 26, 1916, and is not yet officially reported, but is found in Volume 159 of the Northwestern Reporter on page 335 and on pages 15 to 23 of the record. Two opinions were filed, one by Mr. Justice Brooke and the other by Mr. Justice Ostrander. The latter is designated as a "concurring" opinion, but reached an opposite conclusion from that of the former in respect to the question

whether the powers granted were "in contravention of state or local law." This question was decided in the negative by Mr. Justice Ostrander with whom the other justices concurred. Section 11 (k) was held invalid as beyond the constitutional powers of Congress. The court found it unnecessary to pass upon the question of the alleged unlawful delegation of legislative powers.

SPECIFICATION OF ERRORS.

There are only two questions raised by the assignment of errors. (Rec., p. 25).

(1) Did the Supreme Court of Michigan correctly hold that the enactment of Section 11 (k) transcended the constitutional powers of Congress?

(2) If the above question is answered in the negative, can the conclusion of the Supreme Court of Michigan be sustained upon the second ground of demurrer, viz.: The claimed unlawful delegation of legislative powers?

SYNOPSIS OF ARGUMENT.

Question No. 1. The Constitutional Powers of Congress.

I. General Principles.

A. Changing conditions and the exigencies of modern business must always be considered in defining the implied powers of Congress.

B. In carrying into effect its lawful powers (whether express or implied) Congress has full discretion in respect to the selection of methods and means.

II. Alternative Theories.

The validity of the legislation now attacked can be upheld either

A. By recognizing it as the exercise by Congress of powers not previously defined, but necessarily and properly exercised to meet modern conditions.

B. By treating it as a mere administrative detail connected with the exercise of powers which are already clearly defined.

Without abandoning the first of these theories, we rely on the second for the following reasons:

1. Sec. 11 (k) does not create a new class of corporations, but is merely designed to promote the efficiency and protect the business of national banks.

2. That this is a lawful object, has been clearly determined by this court. The reasons for this determination are now immaterial.

3. The selection of methods and means to promote this lawful object is therefore within the discretion of Congress. The only limit to this discretion is the necessity of connecting the legislation with the legitimate business of national banks.

4. In applying this test, no legislation should be condemned unless its provisions are affirmatively shown to be entirely foreign to the business of banking. All presumptions are in favor of the validity of the legislation.

5. The powers conferred by Section 11 (k) are not beyond the constitutional powers of Congress when tested by the above rules.

Question No. 2. Delegation of Legislative Authority.

The discretionary powers given to the Federal Reserve Board are mere matters of administrative detail and may be justified either

(1) As the ascertainment of the contingencies upon which the act shall take effect, or

(2) As the granting or withholding of a license to carry on a business which is a proper subject of congressional regulation.

ARGUMENT.

I. (A) The Implied Powers of Congress.

Any argument upon this subject must necessarily commence with the case of

McCulloch v. Maryland, 4 Wheat., 316.

This case is important not only because it is the foundation of the national banking system, but also because of its full discussion of the question of implied powers. On this subject Chief Justice Marshall said:

> "Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes incidental, or implied powers; and which requires that everything granted shall be expressly and minutely described. * * * * A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of a prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its import-

ant objects designated and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. * * * The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception." (pages, 406-410) * * *

But the argument on which most reliance is placed is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be "necessary and proper" for carrying them into execution. The word "necessary" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it excludes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.

Is it true that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. * * * This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

Let this be done in the case under consideration. The subject is the execution of those great powers

on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers, to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confiding the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate, and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which if forseen at all, must have been seen dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislative of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation, that we shall be compelled to discard it." (pages 413-416). * * *

The result of the most careful and attentive consideration bestowed upon this clause, is, that if it does not enlarge, it cannot be construed to restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the constitution, if that instrument be not a splendid bauble.

We admit, as all must admit, that the powers of the government are limited, and that its limits are

not to be transcended. But we think the sound construction of the constitution, must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." (pages 420-421).

McCulloch v. Maryland, 4 Wheat., 316.

The bank referred to in the above opinion was the Second Bank of the United States created by special act of Congress, but it has been held that the reasoning of the opinion is equally applicable to banks incorporated under the National Bank act.

Farmers, etc., Bank v. Dearing, 91 U. S., 29.
Eaton v. Iowa, 188 U. S., 220.

Other familiar decisions of this court defining and enlarging the implied powers of Congress are the following:

Stewart v. Kahn, 11 Wall. 493 (507).
Julliard v. Greenman, 110 U. S. 421.
Knox v. Lee, and Parker v. Davis, (Legal Tender cases), 12 Wall., 457.
Dooley v. Smith, 13 Wall., 604.
Ex-parte Yarbrough, 110 U. S., 651 (658).
Luxton v. Bridge Co., 153 U. S., 529.
U. S. v. Gettysburg Electric R. Co., 160 U. S. 668 (681).
Wilson v. Shaw, 204 U. S., 24.

The majority opinion of Mr. Justice Strong in the "Legal Tender Cases" gives a long list of illustrations, following with the general statement that:

"The whole history of the government and of congressional legislation has exhibited the use of a very

wide discretion, even in times of peace and in the absence of any trying emergency, in the selection of the necessary and proper means to carry into effect the great objects for which the government was framed, and this discretion has generally been unquestioned, or if questioned, sanctioned by this court."

I-(b) The Congressional Discretion.

The following decisions of this court illustrate the wide range of discretion possessed by Congress in respect to the selection of methods and means to carry its lawful powers into execution.

U. S. v. Fisher et al, 2 Cranch 358 (396).
Martin v. Hunter, 1 Wheat. 304 (326-7).
Farmer's etc. Bank v. Dearing, 91 U. S., 29.
Ex parte Rapier, 143 U. S. 110 (134).
Logan v. U. S., 144 U. S. 263 (283).
Int. Com. Com. v. Brimson, 154 U. S., 447 (471).
Boske v. Comingore, 177 U. S., 459 (468-69).
Champion v. Ames, 188 U. S., 321 (355).
Northern Securities Co. v. U. S., 193 U. S., 197 (336).
McCray v. U. S., 195 U. S., 27 (55-56).
Hipolite Egg Co., v. U. S., 220 U. S., 45 (58).
Flint v. Stone Co., 220 U. S., 107 (175-176).
McDermott v. Wisconsin, 228 U. S., 115 (128).

If a power is within the limits of the congressional discretion,

> "the influence which its constituents possess at elections are * * * the sole restraints on which they have relied to secure them from its abuse."
>
> *Interstate Commerce Commission v. Brimson* (supra).

II. ALTERNATIVE THEORIES.

(A) Section 11 (k) Considered as the Exercise of Implied Powers Not Heretofore Expressly Denied.

For the sake of the argument, we might safely concede the existence of a marked dissimilarity between the powers granted by Section 11 (k) and the normal powers of national banks. We might go even farther and concede that Section 11 (k) virtually creates a new class of corporations, in the nature of national trust companies. Even with these concessions, we might properly contend that the same principles which in the McCulloch case were held to justify the creation of the Second Bank of the United States, will now justify the creation of any type of corporation which in the opinion of Congress will promote the interests of the Federal Government.

The term "moneyed corporation" has long been used to denote corporations which deal in money and in the business of lending money. Trust companies have been held to be "moneyed corporations."

Platt v. Wilmot, 193 U. S., 602.

It is true that this decision was based upon the terms of the New York statute, but a modern trust company must be considered a "moneyed corporation" under any definition of that phrase which can be framed.

Any type of "moneyed corporation" might have been and might now be properly used by Congress as an agency in conducting the fiscal affairs of the govenment. There is no justification for the exclusion of all types not in common operation at the date of the decision of the McCulloch case.

(B) Sec. 11 (k) Considered as an Incidental Administrative Detail.

1. *No New Class of Corporations Created.*

Without abandoning the position above stated, we consider the provisions of Section 11 (k) not as creating a new type of corporation, but merely as granting to national banks certain new powers and privileges, as an incident to the successful prosecution of their business as banks.

The two theories are entirely distinct. On the one theory, congress would be creating a separate class of corporations, which might or might not possess attributes which would justify their creation under the doctrine of the McCulloch case. On the other theory, Congress is merely giving corporations (whose creation is already authorized and approved) certain additional powers which Congress considers necessary for their successful operation. Upon this theory, the associations in question are none the less banking institutions, and as such are no less useful to the Federal Government, than before. Their powers are enlarged, not restricted, by the new legislation.

2. *The Legality of the Object in View, and the Immateriality of the Reasons Originally Expressed.*

We think that this view of the case tends to eliminate many of its difficulties. The statement that Congress has full discretion in the choice of methods and means to carry into effect its lawful powers gives a reasonably definite guide in respect to powers which are clearly defined. The greatest difficulty arises when we consider the powers which are not so defined either by the Constitution itself or the decisions of this court. In such a case we commence with an uncertain quantity which tends to create an uncertainty whether the legislation is to be considered as an unauthorized extension of the powers themselves, or as a discretionary selection of means and methods to effectuate authorized powers. However, as soon as any one of the im-

plied powers of Congress is defined and confirmed by the decisions of this court, it becomes in effect an express power. The language used by this court in the cases of

> *McCulloch v. Maryland,* 4 Wheat., 316, and
> *Osborn v. Bank,* 9 Wheat., 738 (860-861).

has in effect added to the constitution a provision which may be fairly stated as follows:

> "The Congress shall have power to provide for the incorporation and regulation of banking associations for the assistance of the Government in its fiscal operations and for the transaction of private banking business, and shall have power by appropriate legislation to promote the efficiency of such associations and to protect them in their trade and business."

The object of promoting the efficiency and protecting the business of national banks is therefore in itself a lawful object. By treating the decisions of this court as expressly legalizing this object, we eliminate from consideration the particular reasons given by Chief Justice Marshall for his approval of the incorporation of the Second Bank of the United States. These reasons become of no greater importance than the reasons which caused the members of the constitutional convention to adopt any section of the constitution itself. The mere fact that the congressional powers in respect to national banks were originally justified because of the public functions of such banks, and the assistance which they might give to the fiscal operations of the Government, cannot be considered as limiting all subsequent legislation to the promotion of these special objects. This conclusion is inevitable both from logical and practical considerations. Logically, the reasons which justify the creation of national banks should not necessarily limit their activities when created. Practically, the confinement of national bank legislation to provisions designed solely for the promotion of the banks' public functions would inevitably destroy every bank in existence. We think that the error of the Supreme Court of Michigan consisted in their conclusion that it was necessary to find some natural connection between the powers conferred by Section 11 (k) and the promotion of

the fiscal operations of the Government. Upon this point, the following quotations from the opinion of Chief Justice Marshall in the Osborn case are pertinent:

> "It (the bank) is undoubtedly, capable of transacting private as well as public business. While it is the great instrument by which the fiscal operations of the government are effected, it is also trading with individuals for its own advantage. The appellants endeavor to distinguish between this trade and its agency for the public, between its banking operations and those qualities which it possessed in common with every corporation, such as individuality, immortality, etc. While they seem to admit the right to preserve this corporate existence, they deny the right to protect it in its trade and business.
>
> "If there be anything in this distinction, it would tend to show that so much of the act as incorporates the bank is constitutional, but so much of it as authorizes its banking operations is unconstitutional. Congress can make the inanimate body, and employ the machine as a depository of, and vehicle for, the conveyance of the treasure of the nation, if it be capable of being so employed, but cannot breathe into it the vital spirit which alone can bring it into useful existence. * * * The distinction between destroying what is denominated the corporate franchise, and destroying its vivifying principle, is precisely as incapable of being maintained as a distinction between the right to sentence a human being to death, and a right to sentence him to a total privation of sustenance during life. Deprive a bank of its trade and business, which is its sustenance, and its immortality, if it have that property, will be a very useless attribute. * * * Congress was of opinion that these faculties were necessary to enable the bank to perform the services which are exacted from it, and for which it was created. This was certainly a question proper for the consideration of the national legislature."

Osborn v. Bank, 9 Wheat., 738 (860-4).

It is therefore not essential that it should appear that the particular powers conferred by Section 11 (k) are in themselves of a public nature or that they have in themselves any direct connection with the public functions of the national banks as agencies of the government. A very large part of the powers and privileges conferred upon these banks during the fifty years which have elapsed since the passage of the national bank act, have had no direct governmental connection, but have been designed merely to enable the banks to do business profitably and successfully. Anything which promotes their prosperity and enables them to compete with the state banks and trust companies indirectly promotes the interests of the government. If their privileges were so curtailed or their right of extension so denied as to prevent successful competition with state banks and trust companies, they would be driven out of existence and the government would lose such benefits as it derives from them. If the courts are to assume the responsibility of saying that the privileges conferred by this act are illegally conferred, because of their purely private nature, they have the right to go farther and to say that none of the powers and privileges granted by the original national bank act or any of its amendments can be upheld unless they have some direct connection with the public functions of the banks. Any such conclusion would inevitably close the doors of every national bank now in existence. It is therefore necessary to seek some test of the validity of such legislation other than the public nature of the powers conferred.

3. *The Limits of the Congressional Discretion.*

This court will naturally hesitate, as did the Supreme Court of Michigan, before holding that all legislation which tends in any way to promote the prosperity of national banks is for that reason valid. So broad a test might justify a direct donation from the public treasury, or a grant of authority to operate lotteries or manufacture automobiles. The logical construction lies somewhere between a narrow limitation to powers which directly promote the government's fiscal operations, and the granting of unlimited discretion. It seems plain that no more severe test should be applied

than the requirement that the efficiency to be promoted and the business to be protected should be that of the banks as banks. This merely means that the powers conferred should not be entirely foreign to the banking business. Unless all actual or possible connection with the banking business is negatived, Congress should not be considered as having abused its discretion.

4. *Presumptions and Burden of Proof.*

The decisions of this court uniformly hold that every reasonable presumption must be indulged in favor of the validity of an act of Congress.

U. S. v. Harris, 106 U. S., 629 (636).
U. S. v. Gettysburg Elec. R. R. Co., 160 U. S., 668 (681).
Boske v. Comingore, 177 U. S., 459 (470).
Fairbank v. U. S., 181 U. S., 283 (285).
Sweet v. Rechel, 159 U. S., 380 (392-393).
Knoxville v. Knoxville Water Co., 212 U. S., 1 (8).

One of the above cases holds specifically that

> *"if a statute may or may not be, according to circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed."*
> *Sweet v. Rechel,* 159 U. S., 380 (393).

It is therefore, entirely legitimate for us to base our argument upon facts not proved, but which are within the realm of possibility. The defendants in error must suffer from all deficiencies of proof. If their contention that the powers conferred by Section 11 (k) have no legitimate connection with the banking business is based upon provable facts, these facts should have been proved upon an issue of fact raised in the supreme court of Michigan, and they should not have relied upon a demurrer to our plea. They must therefore now show affirmatively that the powers conferred cannot *by any possibility* have any legitimate connection with the banking business.

5. *Application of Above Rules to Section 11 (k).*

It is not quite fair to select any one of the powers conferred by section 11 (k) (for example, the power to act as the executor of a will) and to use this alone as a test of the validity of the legislation. The powers mentioned in Section 11 (k) are grouped together and conferred upon national banks because they have been grouped together for years in the operations of the banking corporations known as trust companies. They all to a greater or less degree involve a combination of fiduciary relations and financial operations. This combination of powers has been been found by experience to be a practical and efficient combination in case of trust companies and state banks, and it is presumably, for this reason, among others, that this combination has been incorporated into the provisions of Section 11 (k). That these powers have a legitimate connection with the operation of trust companies is settled by many years of experience. If the business of trust companies can, therefore, be shown to have a legitimate connection with the business of banking (or, more properly stated, if defendants in error are unable to negative this fact) then all of these powers may naturally and logically be conferred upon national banks, regardless of their relative value as compared with each other. The real question is, is there any such necessary dissemilarity between the business of trust companies and the business of national banks as to make the act of Congress in conferring upon the latter some or all of the functions of the former unconstitutional under the rules above laid down.

The mere fact that trust companies and banks are both "moneyed corporations" dealing with money as a commodity, ought to be enough to justify a negative answer to this question. Moreover, the differences between banks and trust companies are almost wholly matters of incidental development. A trust company is a bank of deposit which has developed along certain lines, and has assumed certain trust functions in addition to its banking functions. Banks of other types have developed in other directions. The orig-

inal bank however, resembled the modern trust company as closely as it resembled the modern bank.

The early banks were banks of deposit only. Their nature and development have been frequently discussed by this court.

The following case involved the application of the act of Congress of June 30, 1864, which imposed a tax upon the deposits of savings banks. Exemption from liability to taxation under the act was claimed by the complainant upon the ground that it was not a bank either in the popular sense or in the legal sense of that word, and that it had never transacted any banking business. It appeared that the corporation was organized for philanthropic purposes, to encourage habits of industry and economy by receiving and investing in government securities or in stocks, such small sums of money as might be saved from the earnings of workingmen. The articles of association provided that the corporation should not "issue any notes, make any discounts, or transact any business which belongs to or is transacted by incorporated banks other than is herein specified." All of the net profits were to be divided among the depositors, and various restrictions were imposed upon the nature of the securities in which the funds could be invested. The court held that the corporation was a bank. Mr. Justice Clifford, for the Court, said:

> "Obligation of repayment exists throughout, and it cannot make any difference as to the liability of the complainants in this case that the entries are made in a pass-book, and that the depositors can only obtain their deposits at certain stated periods. Deposits are made to be invested for the benefit of the depositors, and the bank is under obligations to repay the amount when demanded, agreeably to the by-laws and charter.
>
> 3. Only remaining condition to bring the case within the words of the body of the act is, that the deposits should be made with a person, bank, association, company or corporation engaged in the business of banking. Agreed case shows that the corpor-

ation complainants were engaged in receiving deposits and loaning the same on interest for the benefit of the depositors. Irrespective of the definition given to that phrase in the language of the proviso, the same conclusion must be adopted from the facts exhibited in the statement of the case, unless it can be established that the receiving of deposits by a chartered company, and loaning or investing the same for the benefit of the depositors, is not a business of banking.

Banks, in the commercial sense, are of three kinds, to-wit: 1, of deposit; 2, of discount; 3, of circulation. All or any two of these functions may, and frequently are exercised by the same association; but there are still banks of deposit, without authority to make discounts or issue a circulating medium. Ang. & Ames, Corp., Sec. 55; McCull, Com. Dict. p. 73.

'Banks for savings,' says McCulloch, 'are banks established for the receipt of small sums deposited by the poorer class of persons for accumulation at interest.' p. 146. Definition given by Grant is more extended, but it amounts to the same thing. Grant, Bank, 614. Courts of justice, also, as well as text writers, recognize the well known distinction between banks of deposit and banks of discount or circulation. Duncan v. Savings Inst., 10 G. & J., 309; People v. Utica Ins. Co., 15 Johns, 399; Grant, Bank, 1, 6, 614.

* * *

7. Fourth question presented for decision is, whether the moneys so received on deposit and invested, are deposits within the meaning of the act of Congress. Obviously the question as presented is substantially answered by the remarks already made in disposing of the preceding question. All the moneys received by the bank, whether for safe keeping or for investments, are deposits within the meaning of their by-laws, and within the very words of their charter. Answer to this question, also, must be in the affirmative."

Bank for Savings v. Field, 3 Wall., 495.

The following case was much like the Field case, but arose in California and involved a different statute. Mr. Justice Clifford delivered the unanimous opinion of the Court, saying:

> "Banks, in the commercial sense, are of three kinds, to-wit; 1, of deposit; 2, of discount; 3, of circulation. Strictly speaking, the term 'bank' implies a place for the deposit of money, as that is the most obvious purpose of such an institution. Originally the business of banking consisted only in receiving deposits, such as bullion, plate, and the like for safe keeping until the depositor should see fit to draw it out for use, but the business, in the progress of events, was extended, and bankers assumed to discount bills and notes to loan money upon mortgage, pawn, or other security, and a still later period to issue notes of their own intended as a circulating currency and a medium of exchange instead of gold and silver. Modern bankers frequently exercise any two or even all three of those functions, but it is still true that an institution prohibited from exercising any more than one of those functions is a bank in the strictest commercial sense, and unless such a bank is brought within the proviso under consideration, is equally subject to taxation as if authorized to make discounts and issue circulation as well as to receive deposits." (Citing cases).
>
> "Tested by these considerations, it is clear that the judgment must be reversed unless it appears that the bank is within the proviso to the section which imposes the tax, and such was the decision of this court in a case involving the same question, though it arose under the prior act of congress levying internal revenue duties."
>
> *Oulton v. Savings Society*, 17 Wall., 109.

In a later case this court went even farther in this direction. The case involved the validity of a New York statute licensing private bankers. The complainant was engaged in receiving deposits in very small sums from time to time until they reached an amount sufficient to be sent to other

states, or foreign countries, principally the latter. He denied that he was in any sense a banker and claimed that the money was received for safe keeping and transmission only. Mr. Justice Holmes said:

> "The receipt of money by a bank, although it only creates a debt, is in a popular sense the receipt of money for safe keeping since the depositor can draw it out again at such time and in such sums as he chooses. * * * One form at least of the business aimed at and * * * carried on by the plaintiff is a branch of the banking business."
>
> *Engel v. O'Malley,* 219 U. S., 128 (136).

The supreme court of Wisconsin held that a department store which received deposits to be repaid either in cash or in merchandise at the option of the depositor, was a bank and subject to the laws regulating the banking business. The court say:

> "In modern times we have a variety of institutions that do a banking business in a popular sense, although the functions performed by them may be widely variant, and none of them may be doing all of the kinds of business included in the above definition. The business conducted by national banks differs from that done by state banks, in that the latter are not banks of issue, while the savings banks do not usually perform all of the kinds of business transacted by other banks. Trust companies that receive deposits and make loans perform two of the most important functions that are performed by banks generally, and for obvious reasons they are subject to regulation to the same extent that banks are."

The court cite Webster's definition of a bank of deposit as "one which receives money for safe keeping," and cite numerous authorities in support of their position.

> *MacLaren v. State,* 141 Wis., 577, 124 N. W., 667 (668).

The following case involved an Arizona statute taxing bank stock. The complainant claimed that it was not a

banking institution. It was engaged in the business of receiving money and investing it for its depositors by loaning it in their names and also of collecting rents and interest due on such loans. The interest and rents collected were subject to check. The corporation charged a commission on its loans to the borrowers and also a commission on the collection of interest and rents. The court held that it was a banking institution, citing the Oulton case and others.

Western Investment Banking Co. v. Murray, 6 Ariz., 215; 56 Pac., 728 (730).

There are other cases to the same effect, which have been decided by the state courts.

In certain states, the differences between savings banks and national banks are fully as great as those between national banks and trust companies. Nevertheless, they are still banks and the differences in question are entirely incidental and wholly subject to legislative control. Each of the three classes of institutions represents a development from the original bank of deposit, and the fact that trust companies have developed in one direction, savings banks in another, and national banks in a third, is a mere incident. The legislative body which controls each can either increase or diminish the similarity between them almost at will without going beyond the natural and legitimate scope of their operations. Even as now organized, the exercise of trust functions is not confined to any one of these three classes of corporations. National banks in receiving special deposits and in many other transactions incidentally act as trustees and cannot avoid doing so. The occasional assumption of fiduciary relations is almost a necessary incident of any active business. The business of both banks and trust companies therefore is a combination of fiduciary relations with financial operations, and the principal differences between them represent mere degrees of specialization.

This court can take judicial notice of the fact that in many of the states, trust companies are exercising all of the powers not only of banks of deposit, but also of banks of discount. This is a matter of common knowledge and the court must presume the existence of any fact which is

within the realm of possibility and which has not been negatived by the defendants in error.

That the powers granted by Section 11 (k) can be profitably, conveniently and appropriately combined with ordinary banking operations is demonstrated by their successful combination in the case of the trust companies and state banks. This very combination has created a class of competitors which may seriously affect the prosperity of national banks (and their consequent usefulness to the government) if they are not enabled by Congress to meet this competition. The trust companies and their counsel cannot logically say that the powers conferred by Section 11 (k) are inappropriate and foreign to the banking business, while trust companies are, at the same time, successfully carrying into effect the very combination which is attacked as illogical and unreasonable.

Our concession that the congressional discretion in respect to national banks may not permit the conferring of powers not germane to the banking business is made for the sake of the argument only. Possibly any such concession is unnecessary and improper. We make it because we think that it can be made without danger to our position. The term "banking business" is, however, used in the broadest possible sense. It is not to be confined to the business now transacted by national banks or by state banks or both. It means any business which can be transacted by a banking association of any kind without losing its character as such.

In determining what powers are germane to the banking business we must include within such powers all those which are ordinarily exercised by other institutions which come into competition with national banks. Competition necessarily involves similarity. The very existence of competition on the part of corporations, combining certain functions, shows that all of these functions are germane to each other.

The power to protect national banks in "their trade and business" must include the power to protect them against competition. This can only be done by granting to the

banks the same powers which are possessed by the competing trust companies.

The decision of the Supreme Court of Michigan was based entirely upon the conclusion that there was no natural connection between the exercise of the powers conferred by section 11 (k) and the carrying on of federal fiscal operations. The Michigan court were therefore testing the constitutionality of the section by false standards, and the correction of these standards must necessarily result in the reversal of their judgment.

Inasmuch as the Supreme Court of Illinois reached the same result as the supreme court of Michigan in

People v. Brady, 271 Ill., 100.

some discussion of the grounds of their decision is also required. The Illinois decision was based on the conclusion that it had not been "shown" by the bank that the powers conferred upon national banks by section 11 (k) "were reasonably necessary to the efficiency of such corporations for the purpose of their creation as governmental agencies." This position is unsound for several reasons.

1. It reverses the burden of proof.

2. It involves the assumption that no new banking legislation is valid unless it is connected with the public functions of the banks.

3. It ignores the fact that the "efficiency" of the banks "as governmental agencies" may be indirectly as well as directly promoted by Congress, and that their prosperity and success as private banking institutions are therefore legitimate objects of legislation.

4. It requires that the powers granted be "reasonably necessary" to the efficiency of the national banks. The proper test (if the congressional discretion is subject to any such test) is not that of necessity, but of tendency. The word "necessary" means "conducive."

U. S. v. Fisher, 2 Cranch, 358 (396).

If the powers conferred may by any possibility tend to promote or preserve the efficiency, prosperity, or success of these banks, it is not essential that they be either "necessary" or "reasonably necessary" for that purpose, in the sense in which these words are commonly used.

5. The Illinois opinion goes even farther than the requirement of "reasonable necessity" and requires a showing of universal necessity, arguing that the elective feature of the act is sufficient to condemn it when judged by this very novel and illogical test.

6. It entirely overlooks the existence of a legislative discretion which ought not to be controlled by the courts so long as it is confined to lawful channels. The test of "reasonable necessity" was applied when the creation of the Second Bank of the United States was approved, and is not to be again applied to each discretionary question of detail connected with the business of national banks.

Delegation of Legislative Powers.

There is, of course, a well recognized distinction between the delegation of legislative authority as such and the delegation of discretionary administrative powers. The decisions upholding this distinction may be roughly divided into two classes:

(1). Decisions which involve the delegation of discretion in respect to the ascertainment of the contingencies upon which an act shall take effect, or the decision of questions of administrative detail.

McCulloch v. Maryland, 4 Wheat., 316 (424).
Miller v. N. Y., 109 U. S., 385.
Stone v. Farmers' Loan & Trust Co., 116 U. S., 307.
Int. Com. Com. v. Ill. Cent. R. R. Co., 215 U. S., 452.
Int. Com. Commission v. C., R. I. & P. R. R. Co., 218 U. S., 88.
Oregon R. Co. v. Campbell, 230 U. S., 525, affirming same case in 173 Fed., 957 (978).
Field v. Clark, 143 U. S., 649.

Fallbrook Irrigation District v. Bradley, 164 U. S., 112 (178).
Ex-parte Kollock, 165 U. S., 526 (536-7).
Consolidated Coal Mining Co. v. Ill., 185 U. S., 203 (210-211).
Butterfield v. Stranahan, 192 U. S., 470 (496).
American Bridge Co. v. U. S., 204 U. S., 364 (387).
M. C. R. R. Co. v. Powers, 201 U. S., 245.
Red C. Oil Mfg. Co. v. Board of Agriculture, 222 U. S., 380 (394).
St. Louis, etc., Ry. Co. v. Taylor, 210 U. S., 281 (287).
U. S. v. Grimaud, 220 U. S., 406 (517 et seq.)

(2). Decisions which involve the creation of boards or commissions authorized to issue licenses and permits, or otherwise to select the individuals qualified or permitted to carry on a business regulated by general statute.

Davis v. Mass., 167 U. S., 43 (48).
Reetz v. Michigan, 188 U. S., 505.
Engel v. O'Malley, 219 U. S., 128 (137).
Bradley v. Richmond, 227 U. S., 477 (482).
Fisher v. St. Louis, 194 U. S., 361 (372).
New York v. Van De Carr, 199 U. S., 552 (562).

The powers delegated to the Federal Reserve Board by the legislation in question may be justified upon either or both of these theories.

The Supreme Court of Illinois even while holding section 11 (k) void as beyond the constitutional powers of Congress, held that it could not be invalidated as involving the unlawful delegation of legislative powers.

People v. Brady, 271 Ill., 100.

Any more elaborate discussion of this question can be properly deferred until the filing of briefs on the part of the defendants in error.

The judgment of the Supreme Court of Michigan should be reversed and vacated.

Respectfully submitted,

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Of Counsel.

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In the Supreme Court of the United States.

OCTOBER TERM, 1916.

FIRST NATIONAL BANK OF BAY CITY, plaintiff in error,
v.
GRANT FELLOWS, ATTORNEY GENERAL OF the State of Michigan, on the relation of Union Trust Co. et al. } No. 764.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE.

STATEMENT OF THE CASE.

This case involves the validity of section 11(k) of an act of Congress approved December 23, 1913, known as the Federal Reserve Act. 38 Stat. 251, 262, c. 6. That section gives to the Federal Reserve Board created by the act the following power:

> SEC. 11(k). To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said board may prescribe.

The First National Bank of Bay City, Michigan, plaintiff in error, was chartered as a national bank on December 1, 1882, under the National Bank Act of June 3, 1864, 13 Stat. 99, c. 106, as amended. (See the National Bank Act of June 20, 1874, 18 Stat. 123, c. 343; Rev. Stat. sec. 5133, 5136; R. 4.) After the passage of the Federal Reserve Act it became a member of the system of banks therein established, and, on application, was granted by the board the right to act as trustee, executor, administrator, and registrar of stocks and bonds. (R. 5, 10.) On the relation of five trust companies the attorney general of Michigan filed an information in the nature of *quo warranto* in the Supreme Court of Michigan to prevent plaintiff in error from thus acting. (R. 2, 23.) The respondent bank pleaded the statutes and the authority granted in pursuance thereof. (R. 4.) The State attorney general demurred to the plea on the grounds (1) that section 11 (k) is unconstitutional in that it is beyond the authority of Congress to confer the power specified upon national banks; (2) that even if Congress possessed such authority it can not delegate it to the Federal Reserve Board; (3) that the granting of the corporate power specified is in contravention of the laws of the State. (R. 11.) The State court sustained the demurrer on the first ground, six of the eight justices expressly finding no contravention of State law. (R. 20–22.) By writ of error the case comes before this court on the pleadings. (R. 24.)

Leave having been obtained, the United States files this brief as *amicus curiae*.

SPECIFICATION OF ERROR.

The second assignment of error (R. 25) is as follows:

> The Supreme Court of Michigan erred in entering a judgment of ouster against the above named respondent, said judgment being based solely upon the decision that the act of Congress above mentioned [§11k] was and is void as beyond the powers conferred upon the Congress of the United States by the Constitution of the United States.

Two issues are thus raised:

1. Has Congress power to authorize a national bank to act as trustee, executor, administrator, or registrar of stocks and bonds?

2. Does the Federal Reserve Board in granting the permission authorized by section 11 (k) exercise nondelegable powers of Congress?

SYNOPSIS OF ARGUMENT.

I.

JURISDICTION.

While no jurisdictional question is raised by the pleadings, the Federal Reserve Board, appearing by counsel as *amicus curiae*, called the attention of the Supreme Court of Michigan to the fact that some doubt exists as to the right of a State court to enjoin and exclude a national bank created as a Federal agency from the exercise of powers granted it by Congress.

Inasmuch as the parties to these proceedings can not confer jurisdiction by consent it seems proper to call to the attention of this court certain cases which have a probable bearing on this subject, although it is the desire of all parties concerned and a matter of great public importance that the determination of the constitutional question involved be expedited as far as possible.

II.

CONSTITUTIONALITY OF SECTION 11 (K) OF THE FEDERAL RESERVE ACT.

(1) Every intendment is in support of the constitutionality of the act. The courts invariably hold that an act of Congress is constitutional unless its repugnancy to the Constitution is clearly apparent.

(2) It is well settled that Congress has the power to incorporate banking associations to be used as instrumentalities of the Government in the conduct of its fiscal affairs.

(3) The power to create carries with it the power to preserve. Congress may vest national banks with any powers it deems necessary to preserve the national banking system or the corporate entity of individual banks.

(*a*) The powers granted to such an association may be either public or private in nature.

(*b*) Every banking association organized under Federal law since 1791 has been endowed with powers purely private in nature, which powers have been exercised for its own advantage in legitimate competition with other corporations.

(*c*) These powers, though private in nature, need not be even incidental to the conduct of the Government's fiscal affairs. It is sufficient if they are necessary to the successful operation of the bank. The character of the powers and the degree of their necessity are matters of legislative discretion.

(*d*) While it is not essential that the powers conferred be incidental to the ordinary banking functions, nevertheless the powers specified in section 11 (k) are, in fact, exercised quite generally by corporations which also exercise commercial banking powers and are similar in many respects to other corporate powers exercised by commercial banks, including national banks.

(*e*) The laws of 44 of the 48 States and also of the District of Columbia provide for the formation of corporations with authority to exercise both fiduciary powers and commercial banking powers.

(*f*) In order to compete successfully with corporations organized or operating under State banking laws, national banks must be given powers substantially similar to those enjoyed by such State corporations. It was therefore not an unreasonable exercise of its discretion for Congress to determine that the powers of national banks should be enlarged by the addition of those specified in section 11 (k) of the Federal Reserve Act.

(4) Section 11 (k) has a direct relation to the underlying purpose of the Federal Reserve Act, to wit, the creation of a new basis for nonmetallic currency,

to be supported by a cohesive banking system, which should include a majority of the banks of the United States, and insure a currency stable in character and elastic in volume.

(*a*) The currency system created by the National Bank Act was made necessary by the lack of uniformity and by instability of the State bank note.

(*b*) Experience has demonstrated that while the National Bank Act provided a uniform and stable currency system it lacked elasticity and was otherwise defective.

(*c*) The Federal Reserve Act is designed to remedy these defects while preserving uniformity and stability.

(*d*) Section 11 (k) is a necessary factor in providing a more elastic currency and in insuring stability of the new currency system provided by the act.

(5) The section is not a delegation of legislative authority. The Federal Reserve Board is not empowered to permit any national bank to exercise any fiduciary power not enumerated in section 11 (k). Its power is administrative.

(6) Neither the granting nor the exercise of the powers in question involves any invasion of the sovereign rights of the States. The opinions of the Illinois and Michigan courts in this regard are based upon a manifest misapprehension of the effect of the exercise of these powers.

ARGUMENT.

I.

JURISDICTION.

A State court is without jurisdiction to enjoin the operation of a Federal agency.

In the case of *Ableman* v. *Booth*, 21 How. 506, the Supreme Court of Wisconsin held that the fugitive slave law was unconstitutional and discharged a prisoner held under a warrant issued by a United States Commissioner for aiding and abetting the escape of a fugitive slave, and also discharged the same person from confinement after indictment and conviction in the United States District Court. This judgment of the Supreme Court of Wisconsin was reversed by the Supreme Court of the United States.

The same question was presented in *Tarble's Case*, 13 Wall. 397, where a soldier in the United States Army was discharged on habeas corpus by a supreme court commissioner of the State of Wisconsin on the ground that he had been unlawfully enlisted while a minor without the consent of his guardian.

In both cases the courts of the State were declared by the Supreme Court of the United States to have been without jurisdiction.

The fundamental proposition upon which the *Ableman* and *Tarble* cases rest is that no State has power to obstruct a Federal officer in the discharge of his duties. It is true, as was argued in the *Ableman* case, that the Supreme Court of Wisconsin had general jurisdiction to pass upon the constitutionality of the

fugitive slave law; it had power to do this in any proceeding which did not directly interfere with or arrest the functions of the Federal Government, but no State can lawfully do an act which will suspend the machinery of the Federal Government. As stated by the court in *Tennessee* v. *Davis*, 100 U. S. 257, 262—

> "The general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers."

The principle of these cases would seem to apply to an attempt by the State to enjoin or restrain any Federal agency from the exercise of a right or the performance of a duty arising under a Federal statute.

> The right of Congress to determine to what extent a State court shall be permitted to entertain actions against national banks and how far these institutions shall be subject to State control, is undeniable. National banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress and are not to be interfered with by State legislative or judicial action, except so far as the lawmaking power of the Government may permit. [*Van Reed* v. *People's National Bank*, 198 U. S. 554, 557.]

Whether the Federal or State courts have jurisdiction in *quo warranto* proceedings against national banks was the subject of discussion in the case of *State ex rel Wilcox* v. *Curtis*, 35 Conn. 374, in which it was held that an information in the nature of a

quo warranto would not lie in a State court to try the right to the office of director in a national bank.

II.

CONSTITUTIONALITY OF SECTION 11 (K) OF THE FEDERAL RESERVE ACT.

(1) Every intendment is in support of the constitutionality of the act. The courts invariably hold that an act of Congress is constitutional unless its repugnancy to the Constitution is clearly apparent.

In the case of *Buttfield* v. *Stranahan*, 192 U. S. 470, 492, the court says:

> In examining the statute in order to determine its constitutionality we must be guided by the well-settled rule that every intendment is in favor of its validity. It must be presumed to be constitutional unless its repugnancy to the Constitution clearly appears. (Citing *Nicol* v. *Ames*, 173 U. S. 509, 514, 515; *Gettysburg Park Case*, 160 U. S. 668, 680.)

See also *Hepburn* v. *Griswold*, 8 Wall. 603; *Legal Tender Cases*, 12 Wall. 457.

(2) It is well settled that Congress has the power to incorporate banking associations to be used as instrumentalities of the Government in the conduct of its fiscal affairs.

> *McCulloch* v. *Maryland*, 4 Wheat. 316, 401.
> *Osborn* v. *U. S. Bank*, 9 Wheat. 738, 861.
> *Slaughter-House Cases*, 16 Wall. 36, 64.
> *Legal Tender Case*, 110 U. S. 421, 445.
> *Luxton* v. *North River Bridge Co.*, 153 U. S. 525, 529.

Christopher v. *Norvell*, 201 U. S. 216, 226.

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Veazie Bank v. *Fenno*, 8 Wall. 533, 551.

Mercantile Trust Co. v. *Texas and P. Ry. Co.*, 216 Fed. Rep. 225, 231.

Easton v. *Iowa*, 188 U. S. 220, 229.

Farmers' Nat. Bank v. *Dearing*, 91 U. S. 29, 33.

As stated by Chief Justice Marshall, in delivering the opinion of the court, in *McCulloch* v. *Maryland*, *supra* (p. 401):

> The first question made in the cause is, Has Congress power to incorporate a bank?
>
> It has been truly said, that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.
>
> * * * * *
>
> The power now contested was exercised by the first Congress elected under the present Constitution.
>
> The bill for incorporating the Bank of the United States did not steal upon an unsuspect-

> ing legislature and pass unobserved. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law.

This decision, which was affirmed and elaborated in the case of *Osborn* v. *U. S. Bank, supra,* has been uniformly followed by the later decisions of this court.

(3) The power to create carries with it the power to preserve. Congress may vest national banks with any powers it deems necessary to preserve the national banking system or the corporate entity of individual banks.

(a) The powers granted to such an association may be either public or private in nature.

This question was considered by this court when the constitutionality of the act of Congress creating the first Bank of the United States was before it. An effort was made at that time to sustain the contention that while Congress might have the power to incorporate a bank to be used as an instrument of the Government in the conduct of its fiscal affairs it could not vest corporations so created with the capacity to engage in private business, but could only authorize the exercise of functions to be performed for the Government.

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In discussing this question Chief Justice Marshall, in the case of *Osborn* v. *U. S. Bank, supra,* said (p. 860):

> The whole opinion of the Court, in the case of *McCulloch* v. *The State of Maryland,* is founded on, and sustained by, the idea that the Bank is an instrument which is "necessary and proper for carrying into effect the powers vested in the government of the United States." It is not an instrument which the government found ready made, and has supposed to be adapted to its purposes; but one which was created in the form in which it now appears, for national purposes only. *It is, undoubtedly, capable of transacting private as well as public business.* While it is the great instrument by which the fiscal operations of the government are effected, *it is also trading with individuals for its own advantage.* [Italics ours.]

It was contended in this case that a branch of the Bank of the United States doing business in Ohio was subject to tax under a law of that State which made it liable to an annual tax of $50,000 on each office of discount and deposit, because the operations of the bank were to a large extent of a private business character. To this argument the court replied (p. 863):

> The operations of the Bank are believed not only to yield the compensation for its services to the government, but to be essential to the performance of those services. Those operations give its value to the currency in which all the transactions of the

> government are conducted. They are, therefore, inseparably connected with those transactions. They enable the Bank to render those services to the Nation for which it was created, and are, therefore, of the very essence of its character as national instruments. *The business of the Bank constitutes its capacity to perform its functions, as a machine for the money transactions* of the government. Its corporate character is merely incident, which enables it to transact that business more beneficially. [Italics ours.]

Again (p. 864):

> Congress was of opinion that these faculties were necessary to enable the Bank to perform the services which are exacted from it, and for which it was created. This was certainly a question proper for the consideration of a national Legislature. But, were it now to undergo revision, who would have the hardihood to say, that, without the employment of a banking capital, those services could be performed?

Again (p. 865):

> The court has already stated its conviction, *that without this capacity to trade with individuals*, the bank would be a very defective instrument, when considered with a single view to its fitness for the purposes of government. [Italics ours.]

It is clear, therefore, that a banking corporation created by Congress may be vested with powers of a private nature to be used for its own advantage as well as with the power to perform public functions.

(b) Every banking association organized under Federal law since 1791 has been endowed with powers purely private in nature, which powers have been exercised for its own advantage in legitimate competition with other corporations.

When the first Bank of the United States was organized (1791) powers of the most general character were conferred upon it. It was enacted (Feb. 25, 1791, 1 Stat. 191, 192, c. 10) that a bank of the United States should be established with a prescribed capital stock, the subscribers to which were made a corporation, with power to take personal property, to sell and dispose of it, and to "put in execution such by-laws, ordinances, and regulations, as shall seem necessary and convenient for the government of the said corporation, not being contrary to law, or to the constitution thereof," and "generally to do and execute all and singular acts, matters and things, which to them it shall or may appertain to do" subject to the restrictions prescribed by the act. Those restrictions limited the real estate holdings of the bank, prohibited the purchase of public debts and trade in commodities, and limited the amount of indebtedness which could be incurred. The bank was thus clothed with general powers to transact a banking business subject to few restrictions.

The charter of the second United States Bank (1816) was of a similar broad and comprehensive nature. Act Apr. 10, 1816, 3 Stat. 266, 269, c. 44.

While the powers granted to national banks by the act of 1864 were more restricted than the powers granted to the first and second banks of the United

States, they were, nevertheless, intended to enable such associations to engage in the banking business to the same extent as other banking corporations organized at that time under State laws.

(c) These powers, though private in nature, need not be even incidental to the conduct of the Government's fiscal affairs. It is sufficient if they are necessary to the successful operation of the bank. The character of the powers and the degree of their necessity are matters of legislative discretion.

It is not essential that any particular power vested in a national bank shall be incidental or necessary to the conduct of the Government's fiscal affairs, but it is sufficient *if such power is, in the discretion of Congress, necessary to the successful operation of the bank.*

The court, in discussing further this question (*Osborn* v. *U. S. Bank, supra*), said (pp. 860, 861):

> The appellants endeavour to distinguish between this trade and its agency for the public, between its banking operations and those qualities which it possesses in common with every corporation, such as individuality, immortality, etc. While they seem to admit the right to preserve this corporate existence, they deny the right to protect it in its trade and business.
>
> If there be anything in this distinction, it would tend to show that so much of the act *as incorporates the Bank is constitutional, but so much of it as authorizes its banking operations is unconstitutional.* Congress can make the inanimate body, and employ the machine as a depository of, and vehicle for, the conveyance

of the treasure of the Nation, if it be capable of being so employed, but can not breathe into it the vital spirit which alone can bring it into useful existence.

Let this distinction be considered.

Why is it that Congress can incorporate or create a bank? This question was answered in the case of *McCulloch* v. *State of Maryland*. It is an instrument which is "necessary and proper" for carrying on the fiscal operations of the government. Can this instrument, on any rational calculation, effect its object, unless it be endowed with that faculty of lending and dealing in money, which is conferred by its charter? If it can, if it be as competent to the purposes of government without, as with this faculty, there will be much difficulty in sustaining that essential part of the charter. If it cannot, then this faculty is necessary to the legitimate operations of government, and was constitutionally and rightfully engrafted on the institution. It is, in that view of the subject, the vital part of the corporation; it is its soul; and the right to preserve it originates in the same principle, with the right to preserve the skeleton or body which it animates. *The distinction between destroying what is denominated the corporate franchise, and destroying its vivifying principle, is precisely as incapable of being maintained, as a distinction between the right to sentence a human being to death, and a right to sentence him to a total privation of sustenance during life. Deprive a bank of its trade and business, which is its suste-*

nance, and its immortality, if it have that property, will be a very useless attribute.

This distinction, then, has no real existence. [Italics ours.]

It is clear Congress not only has authority to grant to na banks powers which in themselves are not incidental to the performance of a public function, but it is necessary that it should do so in order that the agency selected by it may efficiently serve the Government when called upon to render any public service.

When national banks were created the powers vested in them were designed to enable them to perform public services and to engage in private business for their own advantage. In their public capacity they may be used as fiscal agents of the Government, as Government depositories, and can and do help materially in the emission of currency and in the transfer of Government funds from one part of the country to another.

It is at once manifest, however, that if Congress had limited the powers of national banks to the exercise of these functions they could not have existed as corporations and hence could not have performed the services required of them.

The deposit of Government funds in a national bank designated as a depository involves an expense to the bank, which is required to pay interest on such deposits, and unless it is permitted to lend these funds to its customers it will receive no compensation for the service of acting as a Government depository.

Its revenue is earned from the use of its funds. It must, of necessity, derive its sustenance primarily from its banking operations conducted for its own advantage, as distinguished from its banking operations conducted as an agent or instrument of the Government, and since this is true those powers which are necessary to preserve and sustain the corporation are to that extent necessary to the Government, and the grant of such powers has been repeatedly held to be within the constitutional power of Congress.

That Congress in the exercise of reasonable discretion must determine what means are necessary to accomplish the proper execution of any power conferred on it by the Constitution, is settled beyond all dispute.

In the case of *McCulloch* v. *Maryland*, *supra*, when discussing the right of Congress to create the first Bank of the United States, the court says (p. 421):

> We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution *must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution*, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end,

which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional. [Italics ours.]

In the case of *Osborn* v. *U. S. Bank, supra* (p. 864):

> *Congress was of opinion that these faculties were necessary to enable the Bank to perform the services which are exacted from it, and for which it was created. This was certainly a question proper for the consideration of the national Legislature.* But, were it now to undergo revision, who would have the hardihood to say, that, without the employment of a banking capital, those services could be performed? [Italics ours.]

In *Knox* v. *Lee* and *Parker* v. *Davis* (*Legal Tender Cases*), 12 Wall. 457, 536, the court says:

> Indeed the whole history of the government and of congressional legislation has exhibited *the use of a very wide discretion, even in times of peace and in the absence of any trying emergency, in the selection of the necessary and proper means to carry into effect the great objects for which the government was framed,* and this discretion has generally been unquestioned, or, if questioned, sanctioned by this court. [Italics ours.]

Again, in *Farmers' National Bank* v. *Dearing*, 91 U. S. 29, 33:

> The constitutionality of the act of 1864 is not questioned. It rests on the same principle as the act creating the second bank of the United States. The reasoning of Secretary Hamilton and of this court in *McCulloch*

> v. *Maryland* (4 Wheat. 316) and in *Osborne* v. *The Bank of the United States* (9 id., 708), therefore, applies. The national banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. *They are means appropriate to that end. Of the degree of the necessity which existed for creating them Congress is the sole judge.*
>
> * * * * * * *
>
> The power to create carries with it the power to preserve. The latter is a corollary from the former. [Italic ours.]

Again, in *Easton* v. *Iowa*, 188 U. S. 220, 238, the court says:

> *Our conclusions, upon principle and authority, are that Congress, having power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control the exercise of their operations.* [Italics ours.]

Applying this doctrine to the present case it seems clear that since the right to create and to preserve national banks has been established Congress in its discretion must determine what means are appropriate to that end and what powers should be conferred upon and exercised by national banks.

That the addition of the powers specified in section 11 (k) does not constitute an unreasonable exercise of this discretion, will appear from a consideration of the character of such powers.

(d) While it is not essential that the powers conferred be incidental to the ordinary banking functions, nevertheless the powers specified in section 11 (k) are, in fact, exercised quite generally by corporations which also exercise commercial banking powers and are similar in many respects to other corporate powers exercised by commercial banks, including national banks.

While Congress is given a wide discretion in determining what means shall be employed to preserve the integrity of the national banking system and the several national banks, and might, if it deemed necessary, vest in such banks powers not ordinarily exercised by banking corporations, in the present case the powers added are peculiarly appropriate to banking institutions.

It is probably true that at the time the national bank act was passed the right to act in the capacity of trustee, executor, or administrator was not regarded as a banking function nor as incidental to any banking power.

It is probably equally true, however, that this right was not then generally regarded as a corporate function at all, since the selection of corporations to act in fiduciary capacities is of comparatively recent development in this country. An individual rather than a corporation was then selected and this is still true in many sections of the United States. In so far as these powers have become functions of corporations, other than trust companies organized for the sole purpose of doing a trust business, they may be said to have been confined to that class of corporations the earnings of which are derived from the loan or investment of funds at interest and that they are more

nearly allied to the banking business than to any other.

It would be difficult to define with any degree of accuracy what constitutes "recognized banking powers," since there is little uniformity in the laws of the several States prescribing the powers which may be engaged in by banking institutions. A composite definition of banking, including an enumeration of the charter powers of banks organized under State laws, would include a very large proportion of all corporate powers, and it is this fact that no doubt influenced Congress in determining to extend the powers of national banks in order that they might be placed on a more nearly uniform basis with other banking institutions. In enlarging the powers of national banks, however, it added only those which have in the natural development of banking become incidental to this class of business.

The argument has been made that the relationship which exists between a national bank and its customer is ordinarily that of debtor and creditor; that this relationship differs from that of trustee and *cestui que trust*, and accordingly a national bank can not consistently be vested with the power to act as trustee or in any other fiduciary capacity.

It is somewhat difficult to appreciate the force of this argument when we consider that the relationships of "debtor and creditor," "principal and agent," and "trustee and *cestui que trust*" have been demonstrated by experience to be so interrelated as corporate functions and so frequently incidental each to

the other that it is the rule rather than the exception for the same corporation to act in each of these capacities.

Trust companies organized for the purpose of acting only in the capacity of fiduciaries have, as an incident of the performance of some trust function, become debtors or creditors of their customers. Beneficiaries of trust estates have found it advisable or convenient to leave on deposit with the trust company which acted as trustee their share of the proceeds of a distribution of an estate to be held subject to the order of the beneficiary and not for reinvestment by the trustee. In such case the relationship between the trust company and the beneficiary is changed from that of trustee and *cestui que trust* to that of debtor and creditor. It was probably due to a development of this practice that trust companies by a process of evolution gradually entered the field of what was popularly known as commercial banking. That is to say, having received deposits from those for whom they had acted as trustees and having thus been placed in funds held subject to the same conditions as demand deposits held by commercial banks, trust companies naturally sought investments in those short-term self-liquidating securities invested in by commercial banks. This was obviously necessary because the deposits so held were subject to check and were payable on demand. These demands could not be met in due course if such deposits were invested in those long-term securities in which trust

funds are ordinarily invested. The practice of receiving funds on deposit from beneficiaries of estates held in trust having proved remunerative to trust companies, it was natural that such companies should solicit similar deposits from others, thus increasing their earning power.

As the demand deposits of such companies increased, the demand on their part for short-term investments in commercial paper and other securities increased as a matter of course, thus bringing them into greater and more active competition with national banks.

The increasing activity of the trust companies in the general commercial banking business is clearly illustrated in one of the exhibits which accompanies the report of the Comptroller of the Currency made to Congress pursuant to the requirements of law for the year 1915. This exhibit, copy of which is printed as an appendix, *infra*, p. 63, consists of an analysis of the business of trust companies made up from reports furnished the comptroller by more than 90 per cent of the trust companies doing business in the United States. From this report it will appear that the aggregate deposits in trust companies have increased from $85,025,371 in 1875 to $4,216,017,244 in 1915. National bank deposits, according to the comptroller's report, increased during the same period from $696,652,020 to $6,611,218,000. The trust companies, therefore, held deposits in 1875 equal to about 12 per cent of the amount held by national

banks, while in 1915 the deposits in trust companies amounted to approximately 66 per cent of the deposits held by national banks.

While the trust-company deposits are not classified in this report until 1909, it will be observed that in 1915 demand deposits subject to check amounted to $2,652,323,201, whereas demand certificates of deposit aggregated $94,827,754, certified checks $,-787,783, and cashiers' checks $23,386,418. These figures indicate what a great proportion of the total demand deposits is of the kind formerly considered peculiar to the business of a commercial bank; that is, deposits subject to check without notice. They equal approximately 96 per cent of the total demand deposits of the trust companies exclusive of savings deposits which may be either demand or time deposits.

It thus appears that the commercial banking business has become so closely allied to the other activities of trust companies that it may be said now to be incidental to the business of a trust company.

On the other hand, commercial banks, even prior to the passage of the Federal Reserve Act, were at times required to assume trust relations as an incident of their business.

They not infrequently came into the possession of funds impressed with a trust. For example, in the case of *American Can Co.* v. *Williams*, 178 Fed. Rep. 420, it was held that when sight drafts attached to bills of lading were delivered to a national bank for

collection and remittance the relation of trustee and *cestui que trust* undoubtedly existed.

Again, in the case of *Boone County National Bank* v. *Latimer,* 67 Fed. 27, where a bank received a note for collection and remittance, but credited proceeds, this was held to be a clear breach of trust—a diversion of a trust fund. See also:

Richardson v. *Olivier,* 105 Fed. Rep. 277.
Richardson v. *New Orleans Coffee Co.,* 102 Fed. Rep. 785.
Wallace v. *Stone,* 107 Mich. 190.
The Drover's National Bank v. *O'Hare,* 119 Ill. 646.
Massey v. *Fisher,* 62 Fed. Rep. 958.
Montagu v. *Pacific Bank,* 81 Fed. Rep. 602.

The powers specified in section 11 (k) of the Federal Reserve Act appear, therefore, to be more nearly incidental and more closely related to the business of banking than to that of any other class of corporations, except those organized solely for the purpose of acting in fiduciary capacities. Such powers do not differ materially from other powers vested in national banks.

Under the provisions of the National Bank Act, banks may receive deposits; may discount notes, drafts, bills of exchange, and other evidences of debt; may lend money on personal security and may make such investments of their funds as are permitted by the National Bank Act. All of these operations are conducted in their private capacity and for their own advantage. They necessarily involve trading with per-

sons and dealing in property within the borders of a State.

The relation created is contractual whether funds are received on deposit subject to investment by the national bank in accordance with the laws of the United States or whether such funds are received in trust subject to investment according to the provisions of the instrument creating the trust or the laws of the State which relate to the administration of the trust estate. But without the aid of section 11 (k) national banks are confined to trusteeships which result from the operation of law while their competitors—trust companies and many State banks—may voluntarily act in the capacity of fiduciaries and at the same time may compete with national banks in the more limited field of commercial banking.

That there is no inconsistency in combining in one corporation fiduciary powers and commercial banking powers is abundantly illustrated by an analysis of the State laws relating to the incorporation of financial institutions.

(c) The laws of 44 of the 48 States and also of the District of Columbia provide for the formation of corporations with authority to exercise both fiduciary powers and commercial banking powers.

An examination of the laws of the various States shows that though there were very few corporations of any kind possessing fiduciary powers prior to the passage of the National Bank Act in 1864, at the present day the laws of every State in the Union authorize corporations to exercise certain trust

powers and in *44 of the 48 States the laws permit a single corporation to exercise not only fiduciary powers but also commercial banking powers.*

Whether commercial banks are allowed to exercise trust powers or trust companies are allowed to exercise commercial banking powers is, for the purpose of this discussion, immaterial. The point to be considered is the competitive force given to a single corporation endowed with both classes of powers. It was that fact which Congress was under the necessity of considering and which not only justifies the action of Congress in giving trust powers to national banks but which made such action imperative.

The court's attention is directed to the fact that in the following States corporations may, upon compliance with various rules and regulations dependent upon the laws of each State, exercise at one and the same time both fiduciary powers and general banking powers:

> Alabama: Code of 1907, sections 3518 and 3524.
>
> Arizona: Civil Code, 1913, sections 284–305.
>
> Arkansas: Section 2, act of April 13, 1903, (banking powers limited to buying and selling all kinds of stocks, bonds, negotiable and non-negotiable paper, and other investment securities, and to receiving monies in trust and paying interest on same).
>
> California: California bank act of March 1, 1909, as amended May 6, 1913, section 22.

Colorado: Revised Statutes 1908, section 305, subdivisions 7 and 10.

Connecticut: Laws 1913, chapter 194, section 8.

Delaware: Special acts of legislature incorporating trust companies authorize the exercise of banking powers.

District of Columbia: 31 United States Statutes, chapter 854, subchapter eleven, sections 715 to 748.

Florida: Act of June 5, 1911, section 3, chapter 6425, Laws of Florida.

Georgia: Code, 1914, section 2817.

Idaho: Session Laws, 1911, chapter 124, section 20.

Illinois: Section 1, chapter 16a of Hurd's Revised Statutes of Illinois, 1915–1916.

Indiana: Laws of 1915, chapter 97.

Iowa: Code of Iowa, Supplement, 1913, section 1889d, page 683.

Kansas: Laws of 1907, chapter 425.

Kentucky: Kentucky Statutes, 1915, section 612a.

Louisiana: Act 45, Laws of 1902, page 59.

Maine: Laws of 1907, chapter 96, page 93.

Maryland: Special acts of legislature incorporating trust companies authorize the exercise of banking powers.

Massachusetts: Chapter 116, Revised Laws, 1902, sections 12 and 13.

Minnesota: General Statutes, 1913; sections 6409, 6416, 6417. Banking powers exercised by trust companies are considerably restricted.

Mississippi: Section 263, Mississippi Code, 1906, as amended by chapter 125 of the acts of 1914.

Missouri: Laws of 1907, article XII, section 5, pages 135 and 136.

Montana: Revised Code, 1907, title 2, chapter 2, sections 3927, 3928, 3930, and 3937.

Nevada: Revised Laws of Nevada, 1912, section 620.

New Hampshire: Special acts of legislature incorporating trust companies authorized the exercise of banking powers. Laws 1915, chapter 109, section 34, prohibit any corporation, national or State, from acting as administrator or executor.

New Jersey: Laws of 1899, chapter 174, section 6.

New Mexico: Laws of 1915, chapter 67, sections 2 and 3.

New York: Laws of New York, 1914, volume 2, chapter 369, Article V, section 185.

North Carolina: Revised Laws, 1908, sections 222, 228, 228a.

North Dakota: Civil Code, chapter 22, sections 4682 and 4689; Laws of 1903, chapter 195, section 1.

Ohio: Laws of 1908, page 269, house bill 833, sections 1 and 4.

Oklahoma: Session Laws of 1908, chapter 6, house bill 615, Article I, section 3.

Oregon: General Laws, 1913, chapter 354, section 4.

Rhode Island: Laws of 1908, chapter 1590, section 46.

South Carolina: Acts of 1903, act 37.

South Dakota: Compiled Laws, 1913, vol. 2, p. 128za; chapter 225, Laws of 1911.

Tennessee: Shannon's Code, 1896, sections 2090–2100; Code Supplement, 1904, sections 3217–3273.

Texas: McEachin's Civil Statutes Ann., 1913, vol. 1, article 380.

Utah: Compiled Laws of 1907, chapter 9, section 424.

Vermont: Acts of 1910, No. 158.

Virginia: Special acts of legislature incorporating trust companies authorize the exercise of banking powers.

Washington: Section 3349 of Remington & Ballinger's Codes and Statutes.

West Virginia: Acts of 1903, chapter 7, section 1.

Wyoming: Revised Statutes, 1899, section 3085.

It will be observed that the only States not included in this list are Michigan, Nebraska, Pennsylvania, and Wisconsin. In many of the 44 States which are listed above State banks and, in some of them, even national banks are expressly authorized by the State laws to do a trust business; in others the State law provides for the formation of joint banks and trust companies, and in the majority of them the law expressly authorizes trust companies to do a general banking business. The result in all cases, however, is a single corporation, whether called a bank, a trust company, or a bank and trust com-

pany, possessing the power to do both a commercial banking and trust business.

(f) In order to compete successfully with corporations organized or operating under State banking laws, national banks must be given powers substantially similar to those enjoyed by such State corporations. It was therefore not an unreasonable exercise of its discretion for Congress to determine that the powers of national banks should be enlarged by the addition of those specified in section 11 (k) of the Federal Reserve Act.

When the act of 1864 became a law a national bank organized under that law was authorized (13 Stat. 101), to exercise by its board of directors, or duly authorized officers or agents, subject to law—

> all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this act.

The genesis of the legislation creating national banks, as well as the subsequent course of such legislation, is consistent only with the theory that Congress intended that these banks should have in general powers similar to those exercised by other banking institutions organized under State laws. The words quoted were not intended as a limitation upon the incidental powers appropriate to a banking business but were intended to confer in broad outline the usual banking powers.

Commenting upon this clause, Mr. Justice Rapallo, in *Pattison* v. *Syracuse National Bank*, 80 N. Y. 82, 89, said:

> That the enumeration of banking powers contained in the act of 1864 was not significant of an intention to place any special restriction upon national banks, as distinguished from State banks, is apparent from the fact that it is a *usual formula, descriptive of the banking business, contained in bank charters* (Charter of Commercial Bank of Albany, Laws of 1825, p. 198; Dutchess Co. Bank, id., p. 204), and is almost identical with that contained in the general banking law of 1838 (Laws of 1838, p. 249, Sec. 18) which provides that "such association shall have power to carry on the business of banking by discounting bills, notes, and other evidences of debt; by receiving deposits; by buying and selling gold and silver bullion, foreign coins and bills of exchange in the manner specified in this act; by loaning money on real and personal security, and by exercising such incidental powers as shall be necessary to carry on such business." The meaning of the two provisions is the same, and their language is the same, except in the order of arrangement. In both, the business of banking is defined, that is, discounting paper, receiving deposits, etc., and all powers incident to these general banking powers are added. In the act of Congress the frame of the sentence is that national banks shall exercise all such incidental powers as shall be necessary to carry on the business of banking, and then follows

> a description of the banking business, while in the act of 1838 the banking business is first described and the grant of incidental powers follows. The enumeration in the act of Congress is not of the incidental, but of the principal powers, and to them are superadded all incidental powers.

Since that time a number of powers and privileges have been conferred upon State institutions so that the powers enumerated in section 5136 R. S. above quoted can no longer be said to constitute the "usual formula, descriptive of the banking business, contained in bank charters."

Congress has found it necessary from time to time to modify the restrictions imposed upon national banks in order to enable them to compete successfully with State institutions. For example, by the act of June 22, 1906, 34 Stat. 451, c. 3516, it permitted national banks to lend to one person, firm, or corporation an amount equal to 10 per cent of the capital and surplus of the lending bank instead of an amount equal to 10 per cent of its capital. By the act of March 14, 1900, 31 Stat. 45, 48, c. 41, it authorized the incorporation of banks with $25,000 capital under certain conditions, thus reducing the minimum amount ($50,000) required before the passage of this act. By the act of June 20, 1874, 18 Stat. 123, c. 343, it amended section 5191 R. S., so as to require no reserve to be carried against circulation, thus increasing the lending power of such banks.

Prior to the passage of the Federal Reserve Act, however, Congress had not in any sense kept pace with State legislatures in the extension of corporate banking powers and the discrepancy between State banking powers and national banking powers had become a source of serious concern to those engaged in the banking business under national charters.

When section 9 was incorporated in the Federal Reserve Act, giving to State banks and trust companies the right to obtain the benefits of the Federal reserve system, this discrepancy became a matter of even more serious moment, since it deprived national banks of certain advantages which up to that time had served to offset to some extent the broader powers enjoyed by State banks and trust companies. State banks becoming members of the Federal reserve system under section 9 of the act are entitled to the privilege of obtaining Federal reserve notes and of rediscounting commercial paper. They may be designated as Government depositories by the Secretary of the Treasury and enjoy practically all of the privileges of national banks except the privilege of issuing circulating notes against the security of Government bonds, and this is largely offset by the privilege of obtaining Federal reserve notes.

With these faculties added to the advantages already enjoyed by reason of the broader corporate powers of State banks and trust companies, it became imperatively necessary for Congress, in order to preserve the integrity of the national banking system and of

the banks composing this system, to enlarge to some extent the competitive powers of national banks by giving them rights and privileges somewhat similar to those already enjoyed by competing State corporations.

In addition, therefore, to extending the corporate powers of national banks by authorizing them (1) to increase their loaning power (section 19, Federal Reserve Act), (2) to loan money under certain restrictions on the security of real estate (section 24, Federal Reserve Act), and (3) to accept drafts or bills of exchange based on the exportation or importation of goods (section 13, Federal Reserve Act), Congress also provided that, with the permission of the Federal Reserve Board, such banks should have the right to act as trustee, executor, administrator, and registrar of stocks and bonds (section 11 (k), Federal Reserve Act), in order to enable them to compete with those State corporations which possess both fiduciary and commercial banking powers. By an amendment to the act, approved September 7, 1916, 39 Stat. 752, Congress has attempted to still further coordinate the powers of national banks and those created and organized under State laws, (1) by authorizing national banks to accept drafts and bills of exchange in certain domestic transactions (section 13, as amended); (2) by authorizing banks under certain conditions to subscribe to stock of banks engaged in international or foreign business; (3) by permitting banks to lend on city real estate under certain conditions and subject to certain restrictions; (4) by permitting

those banks located in places of less than 5,000 inhabitants to act as the agent for insurance companies and as broker or agent for others in making loans under certain prescribed conditions.

The burden of showing that Congress has exceeded its powers in enacting section 11 (k) into law rests upon the defendants in error, and (assuming for the moment that there is no question of the delegation of legislative authority) unless proven affirmatively to the satisfaction of the court that Congress has grossly exceeded its discretion in determining that the powers conferred by section 11 (k) are necessary to the successful operation of the national banking system, it is respectfully submitted that there is no basis for the contention that this section is unconstitutional and void.

It is to be noted that, notwithstanding this burden is upon defendants in error, they have failed to present any evidence to indicate that Congress abused its discretion in determining that fiduciary powers were necessary adjuncts to the operations of national banks at the present time.

(4) Section 11 (k) has a direct relation to the underlying purpose of the Federal Reserve Act, to wit, the creation of a new basis for nonmetallic currency, to be supported by a cohesive banking system which should include a majority of the banks of the United States, and insure a currency stable in character and elastic in volume.

While it is in no sense necessary under the decisions of this court that the private powers granted to

national banks should be related or incidental to the public functions performed by such banks, nevertheless the grant of powers specified in section 11 (k) was in fact an appropriate means selected by Congress not only of insuring to banks composing the Federal reserve system an adequate supply of commercial paper to be used as security for Federal reserve notes, but also of establishing the system itself upon the broadest basis of membership. It was designed both to protect banks within the system from unequal competition which might destroy their allegiance, and to induce those without the system to enter it. One of the purposes of the act, which is aided by section 11 (k), was the creation of a new basis of nonmetallic currency to be supported by a cohesive banking system, such system to include a large majority instead of a minority of the banks of the United States as at present. This new system, while insuring by appropriate safeguards the stability of notes circulating as currency, will also provide for elasticity in its volume. In this view the grant of these powers is directly connected with an important governmental function, namely, the creation of a uniform, sound, and stable currency system. An analysis of the purposes of the Federal Reserve Act will show the relation of section 11 (k) to the new currency system. Such an analysis makes necessary a brief review of the history of currency legislation and a consideration of some of the defects of the financial system which the Federal Reserve Act was intended to correct.

(a) The currency system created by the National Bank Act was made necessary by lack of uniformity and by instability of the State bank note.

After the liquidation of the second bank of the United States in 1836 the fiscal affairs of the Government were conducted without the aid of any banking institution organized under the laws of the United States until the national banking system was created at the close of the Civil War. Collections and disbursements of Government revenues during this period were made in specie. As stated by White in "Money and Banking," 5th ed., p. 107:

> Prior to the Civil War the fiscal operations of the Government were transacted exclusively with coin, by its own officers, without the intervention of banks.

The nonmetallic currency of the country then consisted of the notes issued by State banks. The grave hardships of that system—to the Government and the people at large—are a matter of common knowledge.

In the stress of the Civil War, when the Government was under the necessity of borrowing large sums of money and the people at large were struggling with the evils of a depreciated paper currency, consisting of United States notes and notes of some 1,400 State banks, some good and more bad, the national bank system was created.

This system was in brief the incorporation of a number of banks under national charters and under Federal supervison which were authorized to engage

in a general banking business in the several States. Each of these national banks was permitted to issue its bank notes, uniform in character, against and based upon an equal amount of United States bonds owned by the banks but deposited with the Treasurer of the United States as collateral security for the notes issued. Two of the main purposes of the act which brought this system into existence were to create an enlarged market for United States bonds and to establish in the country at large a uniform and reliable nonmetallic currency. As stated by this court in *Tiffany* v. *Nat. Bank of Missouri*, 18 Wall. 409, 413:

> National banks have been National favorites. They were established for the purpose, in part, of providing a currency for the whole country and in part to create a market for the loans of the General Government.

The same idea is expressed in other cases. See *Merchants Nat. Bank* v. *United States*, 214 U. S. 33, 42; *Mercantile Bank* v. *New York*, 121 U. S. 138, 154.

While the national bank note was issued and permitted to circulate under appropriate safeguards designed to insure its stability, so long as several hundred State banks placed their notes in circulation, without these safeguards, it was of course impossible to bring about uniformity in the value of this form of currency. Accordingly, on July 13, 1866, 14 Stat. 98, 146, c. 184, Congress found it necessary to pass an act which placed a prohibitive tax on all circu-

lating notes of State banks. This act drove many of the State banks into the national system—just as Congress intended.

In sustaining the constitutionality of this act this court said in *Veazie Bank* v. *Fenno*, 8 Wall. 533, 549:

> Having thus, in the exercise of undisputed constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may constitutionally secure the benefit of it to the people by appropriate legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain, by suitable enactment, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile.

It was argued in this case that the act was unconstitutional because the amount of the tax indicated a purpose on the part of Congress to destroy a franchise of the State banks. The court in discussing this point said (p. 548):

> It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is therefore beyond the constitutional power of Congress.
>
> The first answer to this is that the judicial cannot prescribe to the legislative departments

> of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution.

The initial failure of the system of national bank currency came from the fact that the State banks continued to do the main banking business of the country and to be the main handlers of currency. The success of the system was expedited by the statute above referred to, which put the State banks out of business as banks of issue and thus left in circulation only those notes which were issued and redeemed under appropriate safeguards.

(b) Experience has demonstrated that while the National Bank Act provided a uniform and stable currency system it lacked elasticity and was otherwise defective.

In the period following the Civil War, and particularly in the period from 1885 to 1913, difficulties developed in the national banking system.

The first difficulty lay in the fact, clearly understood by the banking community, that the currency was not sufficiently elastic. Inasmuch as it was based on a nonelastic basis, *i. e.*, the United States bonds owned by the banks, there was no way in which the bank-note currency could quickly and easily adapt itself to the varying demands for a proper circulating

medium—as, for instance, in crop-moving periods, when there was need for a much greater amount of currency. (See Holdsworth's "Money and Banking," pp. 330, 331.)

A second defect in the national banking system was the immobility of bank reserves—due to rigid reserve requirements by which each bank kept its metallic reserve against liabilities in its own vaults or with some other bank in the large cities. The result of this system of scattered reserves was that in times of financial stress and falling prices there were likely to occur currency panics, which paralyzed the credit of the whole country and demoralized prices and markets. At such times each bank, selfishly fearing for its own position, hoarded currency and at the very worst of times called loans, with the inevitable result of shaking public confidence in the soundness of the country's financial institutions. This was demonstrated in the panic of 1907. It is needless to describe in detail these currency panics peculiar to the United States. They were rightly attributed to the lack of cohesion in our banking structure and illustrated the worst defect of our currency and banking system.[1]

[1] The reports which accompanied the introduction of the Federal Reserve Act in both the House and Senate show how keenly Congress was alive to to these difficulties.

Thus the House report (H. Rept. No. 69, 63d Cong., 1st sess., p. 4) states: "In view of the lack of any factor of unity the national banks have failed to furnish to the Nation as a whole a single and powerful system of credit. The strength of the credit situation in each community has depended upon the strength of the banks there situated, and, except in times of stress, has even in these communities been measured by the strength not of the strongest, but of the weakest institution there located."

The Senate committee was unable to agree on details and reported the House bill without recommendation. (S. Rept. No. 133, pt. 1, 63d

In Paine's National Banking Laws, seventh edition, at page 18, it is said that—

> Within the last fifty years our country has had six panics, namely, 1873, 1884, 1890, 1893, 1901 and 1907.
>
> There is no question but that, to a material degree, these panics resulted from defects in our system of banking.

In addition to these inherent defects the constantly increasing activities of trust companies in the field of commercial banking had proven a serious menace to the national banks. From 1895 to 1907 there had

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Cong., 1st sess.) The views of the members of the committee were printed as parts 2 and 3 of the report. The report states (pt. 2, pp. 7, 8):

"Both sections of the committee, however, agreed on the great fundamentals of the bill—that is:

"First. On the necessity for greater concentration of the banking reserves of the country.

"Second. The volume of such reserves.

"Third. The volume of the capital of the proposed banks.

"Fourth. The mobilization of such reserves.

"Fifth. The promotion of an open discount market.

"Sixth. The provision for an elastic currency; the issuance of Federal reserve notes.

* * * * *

"The chief purpose of the banking and currency bill is to give stability to the commerce and industry of the United States, prevent financial panics or financial stringencies; make available effective commercial credit for individuals engaged in manufacturing, in commerce, in finance, and in business to the extent of their just deserts; put an end to the pyramiding of the bank reserves of the country and the use of such reserves for gambling on the stock exchange.

"In order to accomplish these results there are certain great fundamentals recognized by all experts as essential and necessary, to wit:

"First. The proper concentration of the bank reserves of the country under the control of the banks themselves, safeguarded by governmental supervision.

"Second. A suitable banking capital as a margin of safety.

"Third. Placing the larger part of the Government funds with such banks, where they may be used in the service of the national commerce.

"Fourth. Authorizing the issuance of elastic currency against liquid commercial bills under proper safeguards." * * *

been an enormous and, as compared with the national banks, a disproportionate growth in the commercial banking business done by trust companies which were outside the national bank system. They shared, and still share, banking predominance with the largest and strongest national banks. The result was that by 1913 the trust companies had become the "department stores of finance." (Holdsworth's "Money and Banking," p. 295.)

It was therefore evident that any new banking system which sought to check currency panics like the panic of 1907, by joining the sound commercial banking institutions of the country together, could not leave out of consideration the trust companies which had become such important factors in this field of activity.

(c) The Federal Reserve Act is designed to remedy these defects while preserving uniformity and stability.

In order to remedy these defects in our financial system the Federal Reserve Act provides for (*a*) the creation of a new basis of issue of circulating notes, (*b*) for the mobilization of banking reserves, and (*c*) for the inclusion of State banks and trust companies in the Federal reserve system.

Under the Federal Reserve Act the country is divided into 12 districts. The national banks of each district are compelled to contribute a certain proportion of their capital to form a strong Federal reserve bank, the resources of which are conserved primarily for the member banks of that district. Any member bank

may at any time take to its Federal reserve bank sound, short-time commercial paper (which it has discounted for the business community), indorse it, and rediscount it with the Federal reserve bank.

The Federal reserve bank may deposit this paper with its Federal reserve agent (the local representative of the Federal Reserve Board) as security for an issue of Federal reserve notes, and upon setting aside a gold reserve equal to 40 per cent of the amount of commercial paper deposited may obtain Federal reserve notes equal in amount to 100 per cent of the commercial paper deposited. These notes, which are obligations of the United States, are a new form of currency redeemable ultimately by the Federal reserve bank but which are backed by the credit of the United States.

By the scheme thus generally outlined, which is carried on under the supervision of the Federal Reserve Board, a new basis of currency is provided. These notes, instead of being issued against United States bonds, as the national bank notes are, are based upon, and the amount of them is measured by, the commercial paper received by the member banks in the ordinary course of their so-called private business and rediscounted with the Federal reserve banks. Thus, under the new system, because the member bank can always transform its sound commercial paper into currency at the Federal reserve bank, it is expected that the amount of currency out-

standing will, as in other countries, automatically vary with the demands of business and will be immediately obtainable at any time it may be needed by the banks.

The volume of Federal reserve notes issued must necessarily depend upon the volume of commercial paper obtainable from member banks.

It is therefore apparent that, in so far as the State banks and trust companies remain outside the Federal reserve system, by so much the Federal reserve system must fail in furnishing a completely elastic currency.

Holdsworth in his "Money and Banking," article 198, p. 383, says, under the heading "State banks and the new law":

> One of the requisites of banking reform outlined in the previous chapter was solidarity—and unity—of the whole banking system. Since there are at present nearly three times as many banks operating under state charters as national banks it can be seen that this desideratum can not be attained unless a large proportion of the state banks enter the new system.

To make the new currency basis efficient it should ultimately include all the sound commercial banks of the country, and to avoid the currency panics, such as the panic of 1907, all the sound commercial banks as opposed to the speculative institutions of the country should be united and their credit and re-

serves mobilized through the Federal reserve system. The Federal Reserve Act by admitting State banks and trust companies to membership makes them Federal agencies for regulating the currency.

(d) Section 11 (k) is a necessary factor in providing a more elastic currency and in insuring stability of the new currency system provided by the act.

It follows from this review that section 11 (k) is not an unrelated phrase, flung in to please some national bank stockholder so that he may make more profit; it is not simply a scheme to increase the private faculties and private business of the national banks, but it too has a real place and part in the scheme of the Federal Reserve Act. Undoubtedly it tends to enlarge the powers of the national banks, and tends to invade the fields of activity of the State trust companies. Our opponents see in that its vice; on the contrary it is a constitutional justification.

Section 11 (k) is obviously an important factor in the creation of a new basis of currency issue. It is necessary to offset the invitation to State banks and trust companies to join the system. If trust companies become member banks they receive all the advantages of membership in the system, including the stability and standing that comes from Federal supervision and the ability to obtain currency through their Federal reserve banks—and since they already enjoy broader corporate powers than national banks, will become still more dangerous competitors

unless the powers of national banks and trust companies are more nearly coordinated.

On the other hand, even if trust companies do not, in large numbers, join the Federal reserve system (and as a matter of fact they have not), nevertheless, unless the powers of national banks are enlarged in order that they may compete with the trust companies which remain outside of the Federal reserve system these trust companies will continue their growth and the gradual acquisition of the commercial banking business of the country at the expense of the national banks. If this process goes on for the next 10 years as it has in the last 20, then in 10 years the Federal reserve system may fail or break in a panic—just because the basis of the currency will have become not the commercial paper of the country but only a small part of it, and because there will again be lacking the necessary cohesion among the main banking institutions of the country.

A successful and sound plan to regulate the currency of a country must have the cooperation of the predominant financial institutions of the country which are engaged in loaning money and credit. The true purpose of section 11 (k) is to cordinate the powers of national banks and trust companies so that trust companies shall not, by their success and power outside the Federal reserve system, continue such a menace to the system as to curtail its usefulness.

It may be unimportant to the Federal Government whether or not national banks make any considerable profit from the trust business so long as the profits earned from all sources are sufficient to sustain them and to enable them to perform satisfactorily their public functions. It is important, however, to the Government that national banks shall continue banking preeminence, and shall continue to do their share of the commercial banking business. To retain banking preeminence it is most important that the national banks should be able to offer to the general public the same conveniences (as to execution of trusts) afforded by their chief rivals, the trust companies, the "department stores of finance."

The fact that the trust companies have an enormous advantage in gaining commercial banking business is made evident in several ways. First, the stockholders of national banks of the large cities have in many instances united to form a trust company to be operated by the same officers which operate the bank—and have thus practically started trust departments, but with the necessary handicap of maintaining a separate organization. Second, it is notable that some of the States in order to protect their State banks against the competition of the trust companies (operating under the laws of the same State) have permitted their banks to exercise some or all of the functions of trust companies.

This is true of Illinois, Georgia, Idaho, and Nevada. (See statutes, *supra*, pp. 28–31.) The same course has been followed in the laws of New Zealand and England. The Federal Government in granting trust powers to national banks by section 11 (k) is simply protecting the banks against trust company competition in the way which the States themselves have pointed out.

It is in the light of that history and those purposes that we must consider the constitutionality of section 11 (k) as a part of a complete scheme wisely adopted by the National Government to regulate the currency of the country, and to protect commerce between the States from the destructive effect of recurrent panics.

(5) The section is not a delegation of legislative authority. The Federal Reserve Board is not empowered to permit any national bank to exercise any fiduciary power not enumerated in section 11 (k). Its power is administrative, not legislative.

The second ground of demurrer assigned by defendants in error was—

> Because, even if Congress itself possessed the authority to confer upon national banks the corporate powers specified in said section 11 (k), it cannot lawfully delegate such authority to the Federal Reserve Board.

It was argued that Congress by this section has not granted any powers to national banks, but has undertaken to delegate to the Federal Reserve Board the power to legislate on this subject.

This contention was not passed upon by the Supreme Court of Michigan (R. 15, 22). It was, however, expressly declared unsound by the Supreme Court of Illinois in *People* v. *Brady*, 271 Ill. 100, the court saying (p. 104):

> The legislation granting the power was that of Congress; the decision as to what banks the legislation was applicable was delegated to the Federal Reserve Board.

The Illinois court called attention to the fact that the constitutionality of acts delegating administrative power to boards, commissions, or individuals has often been before the courts and as often upheld, citing, among others, the familiar cases of *Field* v. *Clark*, 143 U. S. 649, 694, and *United States* v. *Grimaud*, 220 U. S. 506.

A long line of recent cases exemplifies the law on this point. It is well settled that Congress need not prescribe in detail its legislative policies. It is sufficient if a general rule is laid down. Where the situation dealt with by the legislature is complex, and the applications of the law must vary according to circumstances, great discretion to fill in the details may be vested in the administrative officers. "If this were not so," said Mr. Justice McKenna in *Mutual Film Corporation* v. *Ohio Industrial Commission*, 236 U. S. 230, 246, "the many administrative agencies created by the state and National Governments would be denuded of their utility and government in some of its most important exercises become impossible."

The legislative rule prescribed for administrative action in *Buttfield* v. *Stranahan*, 192 U. S. 470, was merely the fitness and purity of the tea sought to be imported; that in *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177, was the unreasonable obstruction to free navigation. In *St. Louis Ry.* v. *Taylor*, 210 U. S. 281, it was held that the height of drawbars on freight cars could be fixed by the Interstate Commerce Commission. In the *Intermountain Rate Cases*, 234 U. S. 476, wide discretionary powers of the Interstate Commerce Commission to fix rates under the long and short haul clause of the Interstate Commerce Act were sustained. The Ohio Board of Censors were held to have power to determine what are "moral, educational, amusing, and harmless" films in *Mutual Film Co.* v. *Ohio Industrial Commission*, 236 U. S. 230,. Again, it seems impossible to distinguish the case at bar from the Ohio Blue Sky Law case, in which it was held proper to prohibit engaging in the sale of stocks and bonds unless the Commissioner of Banks and Banking was satisfied that the applicant for license was of good repute. *Hall* v. *Geiger-Jones Co.* (No. 438, Oct. Term, 1916), opinion rendered January 22, 1917. A similar case is *Merrick* v. *Halsey* (No. 413, Oct. Term, 1916), opinion rendered January 22, 1917, in which the Michigan Blue Sky Law Commission was empowered to approve securities listed in any standard manual thereby exempting them from operation of the law.

See also *Red "C" Oil Co.* v. *North Carolina*, 222 U. S. 380; *Interstate Com. Comm.* v. *Goodrich Trans. Co.*, 224 U. S. 194; *Kansas City So. Ry. Co.* v. *United States*, 231 U. S. 423.

Numerous cases uphold the right of the legislature to clothe a commission with capacity to determine the conditions precedent upon which corporate rights created by the legislature are exercisable. *State* v. *R. R. Commission*, 137 Wis. 80; *State* v. *Kenosha E. R. Co.*, 145 Wis. 337, 347.

In the present case the congressional rule is as fully defined as the circumstances will permit. National banks are to have the power to act as executor, administrator, and trustee only when not in contravention of the State or local laws, and when the particular bank is the proper institution to act in the fiduciary capacity. The definite standard is the State law and the fitness of the bank. The banks which may apply are many, and their circumstances varied. Higher capitalization or a larger surplus may be necessary in some communities than in others. The banks in the Federal reserve system, moreover, constitute one single system under the general business and governmental supervision of the reserve board. Discretionary power is appropriately vested in their general managers.

As said in the *Merrick* case, *supra*, it is presumed that the reserve board will do its duty. But if there ever is arbitrary action, relief may be had in the courts. (p. 9.)

(6) Neither the granting nor the exercise of the powers in question involves any invasion of the sovereign rights of the States. The opinions of the Illinois and Michigan courts in this regard are based upon a manifest misapprehension of the effect of the exercise of these powers.

In declaring section 11 (k) unconstitutional, the Supreme Court of Illinois, like the Supreme Court of Michigan, reached the conclusion that when Congress undertook to vest trust powers in national banks it invaded the rights of the States. *People* v. *Brady*, *supra*. It is somewhat difficult, however, to determine from either opinion in just what way the rights of the States are supposed to be invaded. The powers specified in the act can not be exercised except "when not in contravention of State or local law," and so no conflict can arise as between any State law and the Federal statute under consideration. The right of a State to legislate on the subject of trust estates is not impaired nor affected. The administration of State laws is in no way interfered with. No State is deprived of any control over persons or corporations acting as trustees, executors or administrators within its borders. Congress has merely vested in national banks the capacity to act when selected by the parties in interest and when permitted by State or local law. It has expressly given to the State the right to place national banks in the class of those under disability.

It would seem, therefore, that the Illinois and Michigan courts have concluded that national banks

vested with trust powers may invade the field of activity of trust companies and that such an invasion constitutes an invasion of the "sovereignty of the States" because trust companies are created by the States. Such a contention is merely a revival of the argument that no Federal agency can be vested with any private power. It is at once manifest that the same argument would apply with equal force to an invasion by national banks of the field of commercial banking, since State banks which engage in this class of business are likewise created by the States. While this appears to be the only basis for the contention that there has been an invasion of the rights of the States, even this theory is not consistent with other parts of the opinions of the Illinois and Michigan courts since both courts concede the right of Congress to create national banks and to vest them with private powers. The underlying thought in both opinions appears to be that in some vague and indefinite way national banks, if vested with trust powers, may prove a menace to the State's control over property within its borders and for this reason the act is unconstitutional.

The Illinois court held that the exercise of trust powers by national banks would contravene the laws of that State. That part of the decision, therefore, which declared section 11 (k) unconstitutional was in the nature of dicta. It might be assumed that under these circumstances it would not have deemed it

necessary to consider the constitutional question involved unless it was apparent that Congress grossly abused its authority. An analysis of the opinion, however, makes it clear that there were no facts before the court indicating any such abuse.

It will be observed that after conceding that Congress had the right to grant trust powers to national banks "if they were reasonably necessary to the efficiency of such corporations for the purposes of their creation as governmental agencies," the court says (p. 110):

> It not being shown such added powers are now necessary to the further success of such purposes * * * we think the act, in so far as it attempted to confer such powers upon national banks, is unconstitutional and void.

It thus appears that the court recognizes that Congress is vested with a discretion in this matter, but contrary to the ordinary rules of evidence, sustained by a long line of decisions of this court, it held that the burden was on the respondent, now plaintiff in error, to show that Congress had not abused this discretion, and not on the relators, now defendants in error, to show that Congress had exceeded its constitutional powers. In other words, it presumed the act to be unconstitutional and in support of its position contended that Congress itself could not have believed these powers to be necessary to national banks because it left it to the banks to determine whether or not they should be exercised. If this test should be

applied to all corporate powers of national banks it would be difficult to sustain the constitutionality of any.

It should be borne in mind that in order to obtain the right to exercise the powers specified in section 5136 R. S., to which the Illinois court referred, it is necessary for those forming an association to comply with certain statutory conditions, which include the filing of an organization certificate with the Comptroller of the Currency; that whenever any corporation so organized desires to change its name, to increase or reduce its capital stock, to change its location, or in anywise to alter or amend its charter, an application must first be made to the Comptroller of the Currency and must be approved by him.

Congress might have provided for a similar procedure on the part of national banks desiring to have trust powers added to their other corporate powers. Inasmuch, however, as the penalty prescribed by section 2 of the Federal Reserve Act for the violation of any of the provisions of that act is to be enforced under the direction of the Federal Reserve Board, it was entirely consistent with the purpose and intent of the act to have application made to the board and not to the comptroller for the addition of the powers in question.

The Michigan court likewise concedes the right of Congress to create national banks and to vest them with private powers. Unlike the Illinois court, it

holds that "undoubtedly, all presumptions are in favor of the constitutionality of the Act in question here and Congress is the judge, within the exercise of its powers, of the functions a national bank should perform" (R. 22).

The court does not suggest that any evidence has been submitted or considered tending to show that Congress has abused the discretion which it recognizes, but in holding the act unconstitutional says (R. 22):

> But in the reasoning of the judges, in the opinions to which I have referred, I find, I think, a conclusive argument supporting the proposition that Congress has exceeded its constitutional powers in granting to banks the right to act as trustees, executors and administrators. If for mere profit it can clothe this agency with the powers enumerated, it can give it the rights of a trading corporation, or a transportation company, or both. There is, as Judge Marshall points out, a natural connection between the business of banking and the carrying on of federal fiscal operations. There is none, apparently, between such operations and the business of settling estates, or acting as the trustee of bondholders. This being so, there is in the legislation a direct invasion of the sovereignty of the State * * *. Such an invasion I think the court may declare and may prevent by its order operating upon the offending agency.

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It thus appears that the sole justification for concluding that Congress has abused its discretion in granting to national banks the powers specified in section 11 (k) is an assumption on the part of the court that some natural connection exists between what it terms the business of banking and the fiscal operations of the Government and that none exists between the business of trust companies and the Government's fiscal operations. The court does not point out how any particular private power heretofore exercised by national banks has a closer relationship to the fiscal operations of the Government than the private powers in question.

It is an interesting fact that the reason assigned for its conclusion that Congress has no power to grant trust powers to national banks is substantially similar to one of the reasons advanced by the opponents of the first Bank of the United States against vesting that bank with any private powers.

As illustrating the similarity between the arguments made at that time and the reasoning of the Michigan court in the present case, it will be observed that in the case of *McCulloch* v. *Maryland, supra*, page 364, counsel for defendants in error stated that a banking corporation "in its proper and natural character * * * is a commercial institution, a partnership incorporated for the purpose of carrying on the trade of banking," and, continuing, said: "But what natural connection is there between the collec-

tion of taxes and the incorporation of a company of bankers?"

The contention was renewed by counsel in *Osborn* v. *U. S. Bank*, 9 Wheat. 733, whereupon the Chief Justice, in passing upon the point raised, said (pp. 860–862):

> The appellants endeavour to distinguish between this trade and its agency for the public, between its banking operations and those qualities which it possesses in common with every corporation, such as individuality, immortality, etc. While they seem to admit the right to preserve this corporate existence, they deny the right to protect it in its trade and business.
>
> If there be anything in this distinction, it would tend to show that so much of the act *as incorporates the Bank is constitutional, but so much of it as authorizes its banking operations is unconstitutional.* * * *
>
> * * * *The distinction between destroying what is denominated the corporate franchise, and destroying its vivifying principle, is precisely as incapable of being maintained, as a distinction between the right to sentence a human being to death, and a right to sentence him to a total privation of sustenance during life.* * * *
>
> *This distinction, then, has no real existence.* [Italics ours.]

No more striking illustration can be given of the real issue involved in the present case.

It would have been useless to concede the right of Congress to create a corporation to be used as an agency of the Government but to deny its right to endow this agency with those faculties which are necessary for its existence and support.

By analogy, it is equally useless to concede the right of Congress to endow such an agency with faculties which a half century ago were sufficient to enable it to live and to perform the functions for which it was created, but to deny the right of Congress to add such new powers as may have been made necessary by changed conditions to enable it to meet the increasingly active competition of corporations created and organized under State law.

In the last analysis, the question to be determined is, Has Congress the power to preserve the national banking system? If it can give to national banks powers similar to those enjoyed by their competitors, the national system can be preserved and the banks composing this system can continue to perform the public services for which they were created. On the other hand, if the legislative discretion of Congress is determined to be so limited that it can not coordinate the powers of national banks, State banks, and trust companies, it is inevitable that sooner or later the national system will disintegrate and those who have embarked upon the banking business will seek their charters from that sovereignty which offers the wider field of activity and the more certain source of revenue.

CONCLUSION.

The decision of the Supreme Court of Michigan should be reversed and the cause remanded with instructions to dismiss the information.

JOHN W. DAVIS,
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JOSEPH P. COTTON,
MILTON C. ELLIOTT,
Counsel.

MARCH, 1917.

APPENDIX.

COPY OF TABLE INCORPORATED IN REPORT OF THE COMPTROLLER OF THE CURRENCY MADE TO CONGRESS FOR THE YEAR 1915.

Classification of loans, other investments and deposits, together with the amount of capital, surplus and profits, and aggregate liabilities of loan and trust companies for each year from 1875 to 1915, inclusive.

Year.	Number.	Loans.				Investments.					
		Secured by other real estate (including mortgages owned).	Secured by collateral other than real estate.	All other loans.	Total loans.	United States bonds.	State, county, and municipal bonds.	Railroad bonds.	Bonds of other public-service corporations.	Other bonds, stocks, warrants, etc.	Total investments.
1875	35				$65,900,174	$2,086,842				$37,323,062	$39,409,904
1876	38				76,608,647	16,491,646				18,847,238	35,338,884
1877	39				67,946,390	19,805,685				17,960,260	37,765,945
1878	35				59,303,327	19,445,460				17,296,237	36,741,697
1879	32				61,171,877	17,948,856				16,892,230	34,841,086
1880	30				74,675,537	19,109,650				18,544,695	37,654,345
1881	31				101,906,566	15,631,573				17,426,054	33,057,627
1882	32				132,054,203	16,934,812				25,878,256	42,813,068
1883	34				140,022,358	17,437,990				30,322,420	47,760,410
1884	35				158,018,009	23,371,084				27,879,858	51,250,942
1885	40				141,542,649	25,376,400				29,750,200	55,126,600
1886	42				156,828,458	27,985,658				43,816,716	71,802,374
1887	58	$16,269,993	$36,544,018	$143,282,819	196,096,830	28,787,717	$178,148	$7,400,348		36,561,529	72,927,742
1888	120	46,606,390	175,033,893	20,060,365	241,700,648	22,899,766	2,006,479	15,702,430		31,970,238	72,578,913
1889	120	53,349,945	193,610,054	44,491,268	291,450,367	27,193,201	3,765,747	19,352,398		26,413,671	76,725,017
1890	149	56,669,834	209,617,297	61,595,409	327,882,540	24,921,203	2,993,365	26,102,410		41,690,518	95,707,496
1891	171	65,072,641	225,012,238	66,791,541	356,876,420	16,057,015	3,828,397	29,771,125		44,316,784	93,973,321
1892	168	55,098,822	256,413,894	73,760,832	385,273,548	18,059,578	6,404,311	27,617,700		54,125,189	106,206,778
1893	228	81,288,973	307,170,395	74,270,229	462,729,597	18,486,636	5,842,753	11,639,330		92,856,182	128,824,901
1894	224	58,149,211	233,662,562	82,609,940	374,421,713	13,449,411	5,728,331	11,166,307		111,880,102	142,224,151
1895	242	50,294,477	221,022,813	162,069,171	433,386,461	39,607,593	3,767,198	5,849,131		127,862,623	177,086,555
1896	260	70,612,944	249,874,349	141,513,656	462,000,949	37,400,637	5,243,292	12,464,537		146,056,085	201,164,551

1897	251	63,643,137	236,044,125	145,942,463	445,629,725	39,097,761	7,677,933	8,706,430	.....	145,645,896	201,128,020
1898	246	92,175,473	303,790,563	143,196,409	539,162,445	34,186,440	6,449,871	14,626,194	.....	138,715,247	193,977,752
1899	260	43,640,072	303,173,568	252,217,393	599,031,033	29,595,770	6,489,823	12,450,197	.....	217,551,083	266,086,873
1900	290	49,965,197	402,763,092	275,223,848	727,952,137	1,863,255	7,399,672	10,439,090	.....	306,139,069	325,841,086
1901	334	59,579,122	607,868,759	272,321,010	939,768,891	2,099,021	10,428,652	21,980,385	.....	361,714,796	396,222,854
1902	417	87,252,612	693,371,795	411,863,904	1,192,488,311	1,594,219	12,594,287	17,975,068	.....	415,417,116	447,580,690
1903	531	94,836,041	830,243,159	378,158,000	1,303,237,200	2,920,082	15,568,451	21,676,001	.....	539,295,165	579,459,699
1904	585	110,004,189	655,276,770	382,324,598	1,147,605,557	1,167,777	19,646,092	32,791,004	.....	613,906,142	667,511,015
1905	683	144,394,593	965,617,090	439,274,979	1,549,286,662	1,902,430	17,657,332	31,606,449	.....	736,752,224	787,918,435
1906	742	166,524,402	895,884,351	547,059,086	1,609,467,839	1,678,160	17,305,806	46,592,846	.....	694,708,668	760,285,420
1907	794	174,235,578	823,109,861	604,018,798	1,601,364,237	1,280,592	11,239,601	31,823,413	.....	741,656,064	785,999,670
1908	842	153,727,485	821,341,681	404,412,308	1,379,481,474	555,303	89,639,659	29,576,312	.....	656,103,997	775,875,271
1909	1,079	377,318,280	1,222,881,129	460,550,859	2,060,750,268	3,222,380	155,647,931	362,404,241	$168,589,933	789,239,579	1,459,104,064
1910	1,091	369,161,435	1,230,282,986	655,016,724	2,254,461,145	1,271,940	144,495,162	312,518,321	159,294,782	924,661,469	1,542,241,674
1911	1,251	467,531,456	1,289,452,721	668,650,649	2,425,634,826	2,224,692	187,123,910	371,707,846	212,593,716	341,128,520	1,114,778,684
1912	1,410	526,509,702	1,279,983,539	900,350,885	2,706,844,126	5,985,094	202,293,176	380,190,967	208,673,579	421,996,627	1,219,139,443
1913	1,515	576,334,682	1,374,332,681	813,018,379	2,763,685,742	2,770,183	113,563,277	297,324,766	334,294,978	443,066,425	1,191,019,629
1914	1,564	[1] 565,435,248	1,367,365,957	968,947,309	2,901,748,517	3,396,028	210,817,736	395,314,294	224,715,658	427,101,410	1,261,345,128
1915	1,664	[1] 643,388,896	1,401,021,422	1,000,969,080	3,045,279,399	2,138,054	241,160,288	401,071,546	232,451,914	472,792,053	1,349,613,857

[1] Includes loans secured by farm lands.

COPY OF TABLE INCORPORATED IN REPORT OF THE COMPTROLLER OF THE CURRENCY MADE TO CONGRESS FOR THE YEAR 1915—Continued.

Classification of loans, other investments and deposits, together with the amount of capital, surplus and profits, and aggregate liabilities of loan and trust companies for each year from 1875 to 1915, inclusive—Continued.

Year.	Number.	Capital stock.	Surplus.	Deposits.							Aggregate resources and liabilities, respectively.
				Individual deposits subject to check without notice.	Savings deposits or deposits in interest or savings department.	Demand certificates of deposits.	Time certificates of deposits.	Certified checks.	Cashier's checks outstanding.	Total deposits.	
1875	35	$21,854,020	$6,967,693							$85,025,371	$122,890,175
1876	38	21,535,490	8,288,825							87,817,992	127,646,179
1877	39	22,347,440	7,164,673							84,215,849	123,612,499
1878	35	22,086,611	7,925,303							73,136,578	110,843,603
1879	32	21,101,876	7,714,316							75,873,219	111,809,936
1880	30	18,501,876	6,191,935							90,008,008	126,869,673
1881	31	19,188,800	6,881,809							111,670,329	156,544,079
1882	32	21,553,718	8,356,302							144,841,596	194,985,825
1883	34	22,778,175	8,812,723							165,378,515	212,342,587
1884	35	23,938,600	10,191,544							188,745,922	239,871,691
1885	40	26,428,600	10,695,984							188,417,293	248,389,683
1886	42	27,644,150	21,671,152							214,063,415	278,314,591
1887	58	36,355,769	15,841,793							240,228,795	319,125,657
1888	120	53,243,510	24,105,371							257,878,114	383,653,477
1889	120	59,445,937	25,583,905							299,612,899	441,268,483
1890	149	70,676,247	34,594,751							336,456,492	503,801,336
1891	171	79,292,889	38,412,197							355,330,080	536,628,202
1892	168	80,645,972	45,824,747							411,659,996	600,244,908
1893	228	94,867,268	50,403,421							486,244,079	726,664,506
1894	224	97,068,092	57,663,599							471,298,816	705,186,944
1895	242	108,963,905	64,179,611							546,652,657	807,063,041
1896	260	111,146,973	62,444,553							586,468,156	855,282,153
1897	251	106,968,253	68,825,967							566,922,205	843,713,745
1898	246	101,228,555	70,658,684							662,138,397	942,462,179
1899	260	104,308,722	79,707,194							835,499,064	1,071,525,994

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VERTICAL IN

1900	290	126,930,845	112,650,803								1,028,232,407	1,330,160,343
1901	334	137,361,704	119,609,186								1,271,081,174	1,614,981,605
1902	417	179,732,581	149,902,172								1,525,887,493	1,983,214,707
1903	531	232,807,735	222,208,091								1,589,398,796	2,298,554,063
1904	585	237,745,488	254,604,398								1,600,322,325	2,380,287,747
1905	683	243,133,622	281,289,339								1,980,856,737	2,865,976,479
1906	742	268,384,337	348,236,524								2,008,937,790	2,959,230,534
1907	794	276,146,081	369,286,668								2,061,623,035	3,071,419,360
1908	842	278,408,759	370,145,308								1,866,964,314	2,865,632,876
1909	1,079	362,703,223	351,699,101	[1]$1,839,023,559	$576,783,099	$91,802,209	$299,880,277	$17,862,855	$10,483,178	2,835,835,180	4,068,534,982
1910	1,091	367,333,556	432,718,233	1,893,159,336	624,601,126	63,056,649	308,782,477	27,609,760	19,465,141	3,073,122,706	4,216,850,061
1911	1,251	385,782,933	400,406,067	2,069,328,509	813,745,937		372,279,171	20,393,328	20,108,947	3,295,855,895	4,665,110,868
1912	1,410	418,985,771	424,313,939	2,319,055,959	910,850,167		395,983,407	16,658,017	32,030,686	3,674,578,238	5,107,444,382
1913	1,515	452,386,839	445,285,028	[2]2,448,240,038	970,855,018		323,824,531	13,854,105	18,413,956	3,575,187,650	5,123,920,197
1914	1,564	462,201,248	446,569,442	[3]2,448,085,497	1,034,906,721	147,714,057	268,135,415	20,373,876	31,138,042	3,950,353,610	5,489,531,037
1915	1,664	476,806,240	450,675,447	[4]2,652,323,201	1,053,569,572	94,827,754	377,122,514	14,787,783	23,386,418	4,216,017,244	5,873,120,341

[1] Includes $12,869,939 unclassified deposits.
[2] Includes $3,826,647 postal savings deposits.
[3] Includes $10,546,512 postal savings deposits.
[4] Includes $11,420,836 postal savings deposits.

MAR 6 1917
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States

October Term, 1916.

No. 764.

FIRST NATIONAL BANK OF BAY CITY, MICHIGAN, PLAINTIFF IN ERROR.

vs.

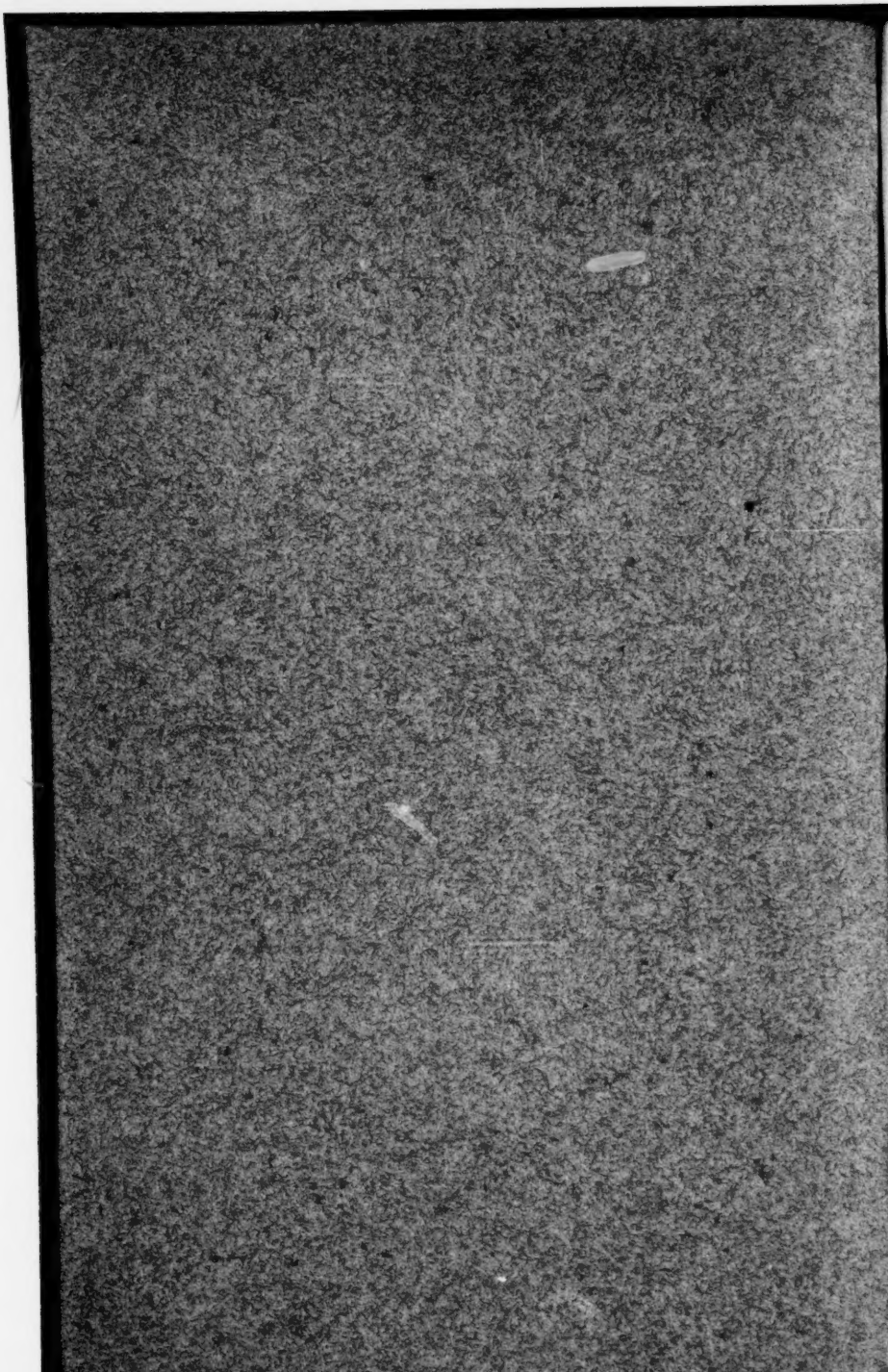
GRANT FELLOWS, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, ON THE RELATION OF UNION TRUST COMPANY ET AL.

In Error to the Supreme Court of the State of Michigan.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

EDWARD S. CLARK,
Counsel for Plaintiff in Error.
Bay City, Michigan.

25,594.



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REPLY BRIEF FOR PLAINTIFF IN ERROR.

POINT I.

CONSTITUTIONAL POWERS OF CONGRESS.

(c) Implied Powers and the Congressional Discretion.

The brief for defendant in error merely amplifies the reasoning of the Supreme Court of Michigan, which was based upon a misconception of the nature of the tests to be applied to legislation of this nature. The argument that our theory would permit the unreasonable extension of the congressional powers, by adding incidental power to incidental power *ad infinitum,* overlooks the fact that this process is

necessarily limited by the limitations of the subject under consideration. The most minute sub-division of a given subject does not enlarge its scope. So long as each step in the process has a logical connection with the preceding step, there is no danger of final transgression beyond proper bounds.

We have argued merely for the recognition of a Congressional discretion in respect to the *means and methods* of effectuating powers already recognized.

(d) The Nature of Trust Companies.

The cases of

Mercantile Bank v. N. Y., 121 U. S., 138, and
Jenkins v. Neff, 186 U. S., 230.

(cited on page 11 of brief for defendant in error) were decided when the powers of trust companies in the State of New York were very limited. The Mercantile Bank case was decided in 1887 and the Jenkins case in 1902. The first enlargement of the powers of trust companies in New York was by an amendment of the New York banking law adopted in 1893 which authorized trust companies "to exercise the powers conferred on individual banks and bankers by Section 55 of this act, subject to the restrictions contained in said section."

Chapter 696, Laws of 1893.

Section 55 referred to, provided as follows:

> "Every bank and individual banker doing business in this state may take, receive, reserve and charge on every loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at the rate of 6 per cent per annum, and such interest may be taken in advance, reckoning the days for which the note, bill, or evidence of debt has run."

It was not until 1914 that the New York legislature ma-

terially extended the powers of trust companies in New York by giving them power.

> "To discount and negotiate promissory notes, drafts, bills of exchange, and other evidences of debt; buy and sell exchange, coin and bullion; lend money on real or personal securities; and to receive deposits of moneys, securities, or other personal property from any person or corporation upon such terms as the company shall prescribe."
>
> Sec. 185, Banking Law of 1914.

The two cases cited must therefore be construed with reference to the statutes in force at the time of their decision. Under any construction, they do not support the position of defendants in error in the present case.

In Mercantile Bank v. New York, the point involved was whether the methods used by the State of New York in taxing shares of stock in national banks violated the section of the revised statutes providing that state taxation of national bank shares should not be at a greater rate than that assessed upon other moneyed capital. In support of the contention that national bank stock was unfairly taxed, reference was made to the method of taxing trust companies. The court was distinguishing between banks and trust companies merely to the extent necessary to show that there might be a reasonable discrimination in the rate of taxation. The principal point emphasized was the fact that the rate of taxation of national bank stock should be compared with the rate of taxation of the stock of state banks, and that this was a fairer comparison than that between national banks and trust companies. The court merely said that those companies were not banks "in the commercial sense of that word, and do not perform the functions of banks in carrying on the exchanges of commerce." This language did not mean that trust companies, even then, were not banks in some other sense of the word. The language which immediately follows shows that the trust companies under consideration were banks of deposit, as such banks are defined in the Oulton and Field cases. Mr. Justice Matthews said:

> "They receive money on deposit, it is true, and invest it in loans, and so deal, therefore, in money and securities for money in such a way as properly to bring the shares of stock held by individuals therein within the definition of moneyed capital in the hands of individuals, as used in the Act of Congress."

The real ground of the decision was not any distinction between banks and trust companies, but was the conclusion finally reached that there was no real discrimination between national banks and trust companies, so far as the rate of taxation was concerned.

Jenkins v. Neff, 186 U. S., 230, involved the same basic question as the case last cited. It was attempted to evade or distinguish the decision in the Mercantile Bank case by relying upon the 1893 amendment to the New York statute above mentioned. The court held that this new legislation did not have the effect claimed, and that there had been no new legislation calling for any qualification of the decision in the Mercantile Bank case. In holding that there was no unlawful discrimination, the court pointed out the difference between the statutory requirements in regard to the investment of the capital of national banks and trust companies, arguing that these differences might reasonably support some differences in the rate and method of taxation. The language quoted by counsel was designed merely to illustrate some of the differences between trust companies and other banking corporations as bearing on the propriety of discrimination in respect to the rate and manner of taxation. The court was not arguing that banks and trust companies were essentially or vitally different, but merely that there was a difference in the primary purposes of their organization. No one would attempt to deny this fact, but it is of no greater significance in the case at bar than the fact that there may be a difference between the primary purposes of the organization of a national bank and of a savings bank designed for philanthropic purposes. It is not the primary object in the minds of the incorporators which is the controlling question in the case at bar. Neither is the case controlled by any superficial differences between trust companies as commonly organized and banks as commonly or-

ganized. Mr. Justice Brewer's opinion in Jenkins v. Neff, (p. 237), recognized the propriety of investing trust companies "with some of the powers of banking associations as an inducement to perform the other duties and obligations imposed by the state." It is equally proper to invest banks with some of the powers of trust companies, as an inducement to perform the other duties and obligations imposed by congress. If the conferring of banking functions upon trust companies does not make them banks, neither does the conferring of trust company functions upon banks make them trust companies. The distinction between identity and similarity must be kept in mind. The two classes of corporations, although entirely distinct, are essentially similar.

(e) There Is No Invasion of State Rights.

The claimed exclusive jurisdiction of the several states over persons and property within their territory, begins only where the federal jurisdiction ends. The power of the federal government, is confined within certain definite channels, but within those channels it is absolute and paramount. If any legislation is concerned with a proper subject of federal activity, the nature of the private property or interests affected cannot be considered as invalidating it.

Questions involving national banks, or interstate commerce, or any of the other great branches of federal activity are completely within the control of Congress, and, in case of conflict, both state rights and private rights must give way. It is therefore entirely misleading to argue that there are certain private rights and privileges which as such are beyond the control of Congress. If they are beyond the control of Congress, it is not because they involve the internal affairs of the states, or the private rights and privileges of their citizens, but solely because they do not happen to be included within any of the constitutional powers of the federal government.

Using, as an illustration, the power of Congress over national banks, we find that whenever there is any real conflict, both state laws, and private rights must give way.

"The states can exercise no control over them, nor in anywise affect their operation except in so far as Congress may see proper to permit." It was so held in regard to the application of state usury laws.

Farmers, etc., Bank v. Dearing, 91 U. S., 29.

The subjects referred to in Section 11-k are no more "peculiarly matters for state regulation" than is the question of the amount of interest which citizens of the various states can be compelled to pay on their private loans from national banks, or the protection by the states of their citizens from the enforcement of usurious contracts. Yet in respect to these matters the state laws must give way, except as they have been confirmed and re-enacted by act of congress. To argue that any matter is purely a subject of state regulation because of the nature of the interests affected is begging the question. The test is to be found not in the effect of the legislation on the state or its citizens, but in the subject of the legislation, as being included in or excluded from the great subjects over which congress is given jurisdiction. The control of national banks is one of these subjects, and any incidental feature of this control derives its validity from the fact that it is such a feature, regardless of the nature of the private interests affected. The cases cited by counsel for defendant in error are not in conflict with our position.

Pennoyer v. Neff, 95 U. S., 714, did not involve any conflict between state and federal authority. The language quoted was not intended to sustain the authority of the state as against that of the federal government, but to protect each sate against unlawful interference with its citizens by the governments of other states.

Overby v. Gordon, 177 U. S., 214, merely followed the rule of Pennoyer v. Neff, in a case still more unlike the case at bar. The question decided was that "the sovereignty of the State of Georgia and the jurisdiction of its courts did not extend to and embrace property not situated within the territorial jurisdiction of the state." (P. 222.)

Brown v. Fletcher's Estate, 210 U. S., 82, was another case which limited state, not federal, authority. A Massachusetts judgment was held unenforcible against a Michigan estate.

U. S. v. Fox, 94 U. S., 320, involved a devise of real estate to the federal government. The court held that the state statute limiting the devise of real estate to corporations, would control, as "the title and modes of disposition of real property within the state * * * are not matters placed under the control of federal authority."

Michigan Trust Company v. Ferry, 228 U. S., 353, again involved a mere question of the extra-territorial effect of judicial proceedings in the state courts.

Dickinson v. Seaver, 44 Mich., 624, merely held that "No administration is extra-territorial" and that "no judgment can be enforced outside of the jurisdiction rendering it"; also that a federal decree could not interfere with state probate proceedings. No question affecting the power of Congress was in any way involved.

Lafferty v. Bank, 76 Mich., 35, merely determined the rights and liabilities arising from the giving of a residuary legatee's bond. The questions at issue in the case at bar were not even remotely involved.

American Missionary Association v. Hall, 138 Mich., 247, merely denied the power of a Probate Court of Ohio to remove a Michigan executor.

Not one of the above decisions is in point in the case at bar. None of them established "the right of the state to exclusive jurisdiction over property within the state." (See brief for defendant in error, page 13.) If this sweeping doctrine were established, nothing would be left of the rule exempting national banks and other federal agencies from state interference. Counsel's argument proves too much. If it is sound, the national bank act must give way to state legislation, in all cases of conflict, and the case of Farmers Bank v. Dearing, 91 U. S., 29, and the many other cases up-

holding the paramount power of Congress over all federal agencies must be overruled.

We disagree with counsel that the subjects covered by section 11-k are "peculiarly matters for state regulation." We see no logical difference in this respect between these, and the other purely private functions of national banks. The handling of a trust fund, or of an estate, or the holding of a trust mortgage is no more a private or personal transaction than the receipt of funds on deposit, the issuance of certificates of deposit, the discounting of commercial paper, or the loan of funds on collateral security. The distinctions sought to be made are purely arbitrary.

Moreover, Section 11-k expressly avoids any possible conflict with the state sovereignty by permitting the application of the section only when it is "not in contravention of state or local law." This constitutes a voluntary abdication by Congress in cases of conflict, where its authority would otherwise be paramount.

POINT II.

Regulatory Legislation.

If the provisions made by Congress for regulating the exercise of the powers conferred by Section 11-k are still incomplete, that it is matter for Congress to remedy. The incomplete exercise of any lawful power does not destroy its legality.

The claimed assumption of exclusive authority by the states raises in a disguised form, the question whether the provisions of Section 11-k are "in contravention of state law,"—a question which was of course finally decided by the Supreme Court of Michigan. The Illinois court (in People v. Brady, 271 Ill., 100) also confused this question with that of the "invasion of state rights." The two are

in fact entirely distinct. The question of the "invasion of state rights" involves only the question whether Congress is legislating in regard to a proper subject of federal legislation. The question of "contravention" involves the question whether the actual carrying into effect of this legislation has resulted or will result in a conflict of laws. The subject of the act of Congress here involved is merely the enlargement of the corporate *capacities* of national banks.

It is an extraordinary claim that any legislative body except Congress itself, is concerned with this subject. We think that counsel confuse the question of the capacity of a national bank to act as fiduciary, with that of the wisdom of its selection or its proper qualification to act as such in a particular case.

In Michigan the mere fact that national banks are, and always have been subject to the supervision of the Comptroller of the Currency, has never made their business an unlawful one from the point of view of the state authorities, and this fact will remain true even if trust functions are added to the functions previously exercised by such banks.

Congress by the enactment of Section 11-k, did not intend to and could not compel the appointment of a national bank as a fiduciary in any case, but merely authorized such appointment. The result was merely to broaden the field of choice of the appointing court or person.

To whatever extent the Probate Courts of the State may have exclusive jurisdiction in such matters, such jurisdiction would not be impaired by the mere addition of another class of corporations which might be considered at the option of those interested in the appointment of executors and administrators. The application of Section 11-k would therefore not interfere with any feature of the state Probate Court jurisdiction or procedure.

The state has passed laws governing the state banks which are fully as elaborate as the so-called trust company act. The national banks are operating in entire disregard of these laws and yet neither the state banks, nor the state

government, nor the citizens of the state are injured thereby. The fact that there might be some incidental difference between the regulations prescribed by the state for trust companies and the regulations prescribed by the federal government for national banks would be of no greater importance to the persons dealing with each than are the present differences between the state and federal methods of regulating the banking business.

The construction and effect of the state laws are disposed of by the opinion of the Supreme Court of Michigan in the present case.

Mr. Justice Ostrander, speaking for the majority (Rec., pp. 20-21), said:

> "There is, therefore, no State policy opposed to corporate trustees, executors or administrators. No corporation, and for that matter no individual, can in any event act in any of the capacities indicated except by appointment. And a corporation, or an individual, in such relations, is governed by the laws of the State and the orders of State courts.
>
> "National banks are, and are not, foreign corporations. They are creatures of congress, agencies of the federal government, domesticated in the state. They may sue and be sued in the courts of the state, but the powers they shall possess, their management and control are beyond state authority, except that a bank like the respondent may not exercise certain powers—cannot lawfully possess them—in contravention of state law.
>
> "No state law is contravened—opposed, come into conflict with—because a corporation exercises the indicated powers, nor by the act of congress creating national banks. The legislature has not declared that national banks in this state shall not have the right 'to act as trustee, executor, administrator, or registrar of stocks and bonds.'
>
> "* * * To say that because the legislature has required certain things of a domestic corporation as a condition to the exercise of the right and cannot re-

quire the same, or similar, things from national banks, therefore the exercise of the right by national banks will be in contravention of state law, seems to me to be an unsound argument. The bank is here, with such structure as Congress has given it, and Congress has in terms declared that among other functions it may perform that of a trustee, etc., if any body wants it to. The mere element of safety of a fund is a matter to be considered by those applying to the corporation to take charge of it, or by the court making an appointment. That one may regard the domestic corporation as the safer institution is not evidence that the other, if it acts, acts in contravention of state law. Certain safeguards surrounding the execution of trusts, etc., by domestic corporations are lost when individuals are appointed to execute them. The individual does not therefore act in contravention of state law.

"Mr. Justice Brooke does not point out in what way, if respondent acts within its apparent powers, the operations of any state law governing trusts, or the settlement of estates, will be interefered with. I am not content to rest so important a decision upon a doubtful inference."

POINT III.

Delegation of Legislative Powers.

The cases cited by relators' counsel are not controlling. The reasoning of these cases might be applicable if Section 11-k had given to the Federal Reserve Board the right—

> "to grant by special permit to national banks applying therefor such additional rights, powers and privileges as the board may approve."

Such an unlimited delegation of authority would, doubtless, be void. Section 11-k, however, delegates no such au-

thority, but merely leaves to the board some administrative discretion in respect to certain definitely specified powers. The primary authority to exercise these powers comes from the statute which enumerates them, not from the board which merely administers the statute.

The following quotations from some of the decisions cited in our original brief furnish a complete answer to counsel's contentions.

> "From the beginning of the government, various acts have been passed conferring upon executive officers power to make rules and regulations, not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it would give to those who were to act under such general provisions 'power to fill up the details' by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress, or measured by the injury done."
>
> "* * * But in making these regulations the officers did not legislate. They did not go outside of the circle of that which the act itself had affirmatively required to be done, or treated as unlawful if done. But confining themselves within the field covered by the statute, they could adopt regulations of the nature they had thus been generally authorized to make, in order to administer the law and carry the statute into effect."
>
> *U. S. v. Grimaud,* 220 U. S., 506 (517-8).

> "We see no difficulty in vesting in some body of men, presumed to be acquainted with the business and its conditions, the power to grant permits in special cases. * * * The authority to delegate that discretion to a board appointed for that purpose is sustained by the great weight of authority. (Citing cases), and by this court the delegation of such power even to a single individual is sustained in Wilson v. Eureka

City, 173 U. S., 32, and Gundling v. Chicago, 177 U. S., 183.

Fischer v. St. Louis, 194 U. S., 361 (372).

"It is not too much to say that a denial to Congress of the right under the constitution to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends, would be to 'stop the wheels of the government' and bring about confusion, if not paralysis in the conduct of public business."

American Bridge Co. v. U. S., 204 U. S., 364 (387).

Respectfully submitted,

EDWARD S. CLARK,
Counsel for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

FIRST NATIONAL BANK OF BAY CITY, plaintiff in error,
v.
GRANT FELLOWS, ATTORNEY GENERAL of the State of Michigan, on the relation of Union Trust Co. et al.

No. 764.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE.

The following memorandum of State legislation since the passage of the Federal Reserve Act is submitted in accordance with leave obtained in the course of the oral argument.

JOHN W. DAVIS,
Solicitor General.
JOSEPH P. COTTON,
MILTON C. ELLIOTT,
Counsel.

MARCH, 1917.

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I.

STATUTES AUTHORIZING NATIONAL BANKS TO DO TRUST COMPANY BUSINESS.

COLORADO, Laws 1915, ch. 48, p. 135–7, "An Act relating to banks and bankers," approved April 12, 1915, provides:

> SEC. 7. Every National Bank, now or hereafter carrying on business in this state, when authorized by special permit granted by the Federal Reserve Board, in conformity with the provisions of an Act of Congress approved December 23, 1913, and known as the "Federal Reserve Act," shall possess, enjoy and exercise the following rights, privileges and powers and be authorized to act in the capacities of trustee, executor, administrator and registrar of stocks and bonds, and in such other fiduciary or trust capacities as may now or hereafter be permitted by the laws of the United States or by the rules or regulations of said Federal Reserve Board.

INDIANA, Laws 1915, ch. 97, p. 310, "An Act granting fiduciary powers to duly organized banks," approved Mar. 8, 1915, provides:

> That every person, firm or corporation transacting a banking business subject to the provisions of an act entitled, "An act to regulate and supervise the business of banking by individuals, partnerships or unincorporated persons," approved March 8, 1907; and every

corporation transacting a banking business as prescribed in, "An act to authorize and regulate the incorporation of banks of discount and deposit in the State of Indiana," approved Feb. 7, 1873, and all acts amendatory or supplemental thereto, and every national bank coming within the United States federal reserve act shall be empowered by this act to accept and execute trusts of any and every description which may be committed or transferred to them, under the same rules and regulations as now govern like powers in loan and trust companies. * * *

IOWA, Supplemental Supplement, Code, 1915, ch. 12–A, "Of additional powers conferred upon Trust Companies, State and Savings Banks," section 1889–d, par. 9, p. 150, provides:

> When so authorized by any law of the United States now in force or hereafter enacted, national banks may exercise the same powers and perform the same duties as are by this section conferred upon trust companies, state and savings banks.

Power to act as executor, administrator, trustee and registrar is conferred by paragraphs 1, 2, 3, 4, 5, 6 of sec. 1889–d upon "trust companies, state and savings banks."

MASSACHUSETTS, ch. 233, Acts 1915, p. 228, "An Act relative to the taxation of National Banks," approved May 8, 1915, provides:

Section 1. Every national bank located in this commonwealth which now is or hereafter

may be empowered to act as trustee and in such capacity to hold personal property shall, annually, between the first and tenth days of April, make a return to the tax commissioner, signed and sworn to by some officer of the bank, of all personal property held upon any trust on the first day of April, whether such property is held by said bank singly or jointly with others, which would be liable to taxation if held by any other trustee residing in this commonwealth, the name of each city and town in this commonwealth where any beneficiaries resided on said day, the aggregate amount of such property then held for all the beneficiaries resident in each of such places, and also the aggregate amount held for beneficiaries not resident in this commonwealth. Every such bank shall annually pay to the treasurer and receiver general a tax to be assessed by the tax commissioner upon the total value of such personal property held in trust at the rate determined by him under the provisions of section six of chapter one hundred and ninety-eight of the acts of the year nineteen hundred and fourteen.

OHIO, Laws 1914, "An Act To grant additional powers to banking corporations organized under the laws of Ohio and to amend section 9764 of the General Code," p. 185–6, section 9796–3, approved Feb. 17, 1914:

No state bank or national bank shall act as administrator, executor, trustee or registrar of stocks and bonds in this state. Provided, however, that trust companies organized under

the laws of Ohio shall have the same powers in the acceptance and execution of trusts which are now conferred upon them by law, and other state banks and national banks may have the same powers in the acceptance and execution of trusts which are now conferred by law upon trust companies, upon such state banks and national banks complying with all the requirements, regulations, and conditions imposed by the laws of Ohio upon trust companies in the matter of the acceptance and execution of trusts.

SOUTH DAKOTA, Laws 1915, ch. 105, p. 224, "An Act relating to National and State Banks to act as trustee, executor or administrator of stocks and bonds," approved March 6, 1915:

It shall be lawful for National banks when authorized by the laws of the United States to act as trustee, executor or administrator of estates or trusts or as registrar of stocks and bonds. Provided, further that State banks may act in similar capacity under such rules and restrictions as the Department of Banking and Finance may prescribe.

VERMONT, Laws 1915, ch. 157, p. 259, "An Act to authorize the appointment of National banks to positions of trust," approved April 2, 1915:

Section 1. To the extent that the laws of the United States permit, any national bank located and doing business in this state may be appointed and act as executor of a will, codicil or writing testamentary, as administrator with will annexed, as administrator of a person

deceased, as receiver, as assignee, trustee or guardian of a person subject to guardianship, under the same circumstances, in the same manner and subject to the same control by the court having jurisdiction, as a natural person legally qualified.

VIRGINIA, Laws 1915, ch. 29, p. 52, "An Act to extend to national banks the rights, powers, privileges, and immunities conferred upon trust companies under an act entitled an act to provide how trust companies may be incorporated, and to provide for general powers for the purpose of doing a trust business in this State, in addition to a general banking business," approved February 10, 1915:

1. Be it enacted by the general assembly of Virginia, That all national banks which have been, or hereafter may be, permitted by law to act as trustee and in other fiduciary capacities, shall have all the rights, powers, privileges and immunities conferred upon trust companies by an act of the general assembly of Virginia, entitled an act to provide how trust companies may be incorporated, and to provide for general powers for the purpose of doing a trust business in this State in addition to a general banking business.

WASHINGTON, Laws 1915, ch. 38, p. 131, "An Act relating to trust companies, national banks, state banks, amending section 3346 of Remington & Ballinger's Annotated Codes and Statutes of Washington," approved March 6, 1915:

* * * Provided, That national banks, having a paid up capital of $50,000, or more

when authorized or permitted so to do by or under any act of the Congress of the United States, may exercise any of the powers conferred upon trust companies organized under this act: And provided further, That any state bank organized under the laws of the State of Washington, having a paid up capital of fifty thousand ($50,000) dollars or more may exercise any of the powers conferred upon trust companies organized under this act by first obtaining permission from the state bank examiner. * * *

II.

STATUTES WHICH MAY BE HELD TO LIMIT EITHER EXPRESSLY OR BY POSSIBLE IMPLICATION THE POWER OF NATIONAL BANKS TO CARRY ON TRUST COMPANY BUSINESS.

CALIFORNIA, Henning's General Laws, vol. 5, 1914, Art. I, sec. 6 (p. 238), "Banks and Banking," provides:

The term "trust company," when used in this act, means any corporation which is incorporated under the laws of this state for the purpose of conducting the business of acting as executor, administrator, guardian of estates, assignee, receiver, depositary, or trustee under appointment of any court or by authority of any law of this state, or as trustee for any purpose permitted by law.

Art. IV, sec. 90 (bottom p. 272):

* * * No foreign corporation shall have or exercise in this state the power to act as trustee under any mortgage, deed of trust,

or other instrument securing notes or bonds issued by any corporation * * *.

DELAWARE, Revised Code of 1915, Ch. 20, "Insurance Department," sec. 70, p. 307, provides:

Any court, judge, or officer authorized by law to appoint any person or corporation to any office of trust, may, in its or his discretion, appoint to such office any trust company incorporated under the laws of this State, and having its principal office or place of business in this State, provided the said court, judge, or officer shall be satisfied that the capital stock of such corporation shall have been fully paid in cash, and that such corporation is authorized by its charter to perform the duties of said office.

(This provision was originally enacted as Act of March 23, 1903, Laws of 1901–1903, vol. 22, ch. 388, sec. 1, p. 749.)

MAINE, Revised Statutes, 1916, under ch. 52, sec. 84, p. 833, entitled "Savings Banks, Trust and Banking Companies, Loan and Building Associations, Foreign Investment Corporations," sub-title "Trust and Banking Companies," provides:

No trust or banking company, association, or institution, incorporated under the laws of this state, or of any other state and doing business in this state, shall act or do business as administrator or guardian, anything in their charter to the contrary notwithstanding.

(This section was originally enacted as Act of March 13, 1889, Laws of 1889, ch. 312, p. 275.)

NEW HAMPSHIRE, Laws of 1915, ch. 109, sec. 34, p. 126, entitled "An act to provide for the incorporation and management of trust companies and similar corporations," approved Apr. 8, 1915, provides:

No trust company, loan and trust company, loan and banking company, bank or banking company, or similar corporation, shall hereafter be appointed administrator of an estate, executor under a will, or guardian or conservator of the person or property of another.

(Sec. 15, p. 122, empowers such corporations to act as trustee, and sec. 16, to act as registrar.)

NEW YORK, Laws of 1914, ch. 369, "An Act in relation to banking corporations, and individuals, partnerships, unincorporated associations and corporations under the supervision of the banking department, constituting chapter two of the consolidated laws," Article V, sec. 223, p. 1371, approved Apr. 16, 1914, provides:

No corporation other than a trust company organized under the laws of this state shall have or exercise in this state the power to receive deposits of money, securities or other personal property from any person or corporation in trust, or have or exercise in this state any of the powers specified in subdivisions one, four, five, six, seven and eight of section one hundred eighty-five of this article, nor have or maintain an office in this state for the transaction of, or transact, directly or indirectly, any such or similar business, except

that a federal reserve bank may exercise the powers conferred by subdivision one of such section if authorized so to do by the laws of the United States and any domestic corporation legally exercising any of the powers conferred by such subdivision at the time this act takes effect may continue to exercise such powers * * *.

Subdivisions one, four, five, six, seven, and eight of section 185 of Article Five, relating to trust companies, are as follows:

1. To act as the fiscal or transfer agent of the United States, of any State, municipality, body politic or corporation; and in such capacity to receive and disburse money, to transfer, register and countersign certificates of stock, bonds or other evidences of indebtedness, and to act as attorney in fact or agent of any person or corporation, foreign or domestic, for any lawful purpose.

4. To act as trustee under any mortgage or bonds issued by any municipality, body politic or corporation, foreign or domestic, and accept and execute any other municipal or corporate trust not prohibited by the laws of this State.

5. To accept trusts from and execute trusts for married women, in respect to their separate property, and to be their agent in the management of such property or to transact any business in relation thereto.

6. To act under the order or appointment of any court of competent jurisdiction as guardian, receiver or trustee of the estate of any minor, and as depositary of any moneys

paid into court, whether for the benefit of any such minor or other person, corporation, or party, and in any other fiduciary capacity.

To be appointed and to act under the order or appointment of any court of competent jurisdiction as trustee, guardian, receiver, or committee of the estate of a lunatic, idiot, person of unsound mind or habitual drunkard, or as receiver or committee of the property or estate of any person in insolvency or bankruptcy proceedings; to be appointed and to accept the appointment of executor of or trustee under the last will and testament, or administrator with or without the will annexed of the estate of any deceased person.

7. To take, accept, and execute any and all such legal trusts, duties, and powers in regard to the holding, management and disposition of any estate, real or personal, wherever located and the rents and profits thereof, or the sale thereof, as may be granted or confided to it by any court of competent jurisdiction, or by any person, corporation, municipality or other authority and it shall be accountable to all parties in interest for the faithful discharge of every such trust, duty or power which it may so accept.

8. To take, accept and execute any and all such trusts and powers of whatever nature or description as may be conferred upon or entrusted or committed to it by any person or persons, or any body politic, corporation, domestic or foreign, or other authority by grant, assignment, transfer, devise, bequest or otherwise, or which may be entrusted or committed

or transferred to it or vested in it by order of any court of competent jurisdiction, or any surrogate, and to receive, take, manage, hold and dispose of according to the terms of such trust or power any property or estate, real or personal, which may be the subject of any such trust or power.

III.

STATUTES EXPRESSLY AUTHORIZING TRUST COMPANIES, OR STATE BANKS EMPOWERED TO DO TRUST COMPANY BUSINESS, TO BECOME MEMBERS OF THE FEDERAL RESERVE SYSTEM.

CALIFORNIA, Act of May 6, 1913 (Statutes & Amendments to the Codes, 1913, ch. 104, sec. 22, p. 149, in connection with sec. 56, p. 160), as amended by the Act of June 3, 1915 (Statutes & Amendments to the Codes, 1915, ch. 608, sec. 56, p. 1112).

DELAWARE, Act Mar. 8, 1915 (Laws 1914, ch. 107, sec. 18, p. 323.)

GEORGIA, Act of August 13, 1915 (Georgia Laws, 1915, Title IV, p. 33).

IDAHO, Act of March 11, 1915 (Session Laws, 1915, sec. 41a, p. 196).

IOWA, Supplemental Supplement Code of Iowa 1915, sec. 1889–0.

KENTUCKY, Act of March 14, 1914 (Acts 1914 Kentucky, ch. 16, p. 61 et seq.)

LOUISIANA, Act July 9, 1914 (Laws 1914, ch. 305, sec. 1, 2, p. 631).

MAINE, Act of March 31, 1915 (Laws of Maine, 1915, ch. 262, pp. 233–234).

MASSACHUSETTS, Act of May 19, 1914 (Acts 1914, ch. 537, p. 472).

MINNESOTA, Act of March 6, 1915 (Laws of 1915, ch. 28, p. 36).

MISSISSIPPI, Act of March 9, 1914 (Laws of Mississippi, 1914, ch. 124, sec. 64, p. 139).

MISSOURI, Act of March 25, 1915 (Laws, Missouri, 1915, Art. III, sec. 127, p. 167).

MONTANA, Act of March 6, 1915 (Laws of Montana, 1915, ch. 89, sec. 23, p. 130).

NEW JERSEY, Act of Apr. 14 (Laws of 1914, ch. 159, p. 293).

NEW MEXICO, Act of March 15, 1915 (Laws of 1915, ch. 67, sec. 96, p. 105).

NEW YORK, Act of April 16, 1914 (Laws of New York, 1914, vol. 2, ch. 369, sec. 185, sub-div. 12, p. 1344).

NEBRASKA, Act of April 12, 1915 (Laws of 1915, ch. 175, p. 359).

NEVADA, Act of February 26, 1915 (Laws of 1915, ch. 31, p. 32).

NORTH DAKOTA, Act of February 10, 1915 (Laws of 1915, ch. 54, p. 61).

OHIO, Act of February 17, 1914 (Laws of Ohio, 1914, House Bill No. 5, pp. 185–186).

OREGON, Act of February 24, 1915 (Laws of 1915, ch. 285, sec. 2, par. 9, p. 427).

SOUTH CAROLINA, Act of February 18, 1914 (Laws of 1914, ch. 333, p. 588).

UTAH, Act of March 15, 1915 (Laws of Utah, 1915, ch. 47, sec. 1, p. 53).

VIRGINIA, Act of March 2, 1914 (Acts of Assembly, 1914, ch. 27, pp. 42–43).

WASHINGTON, Act of March 6, 1915 (Laws of Washington, 1915, ch. 35, sec. 5, p. 128).

IV.

IN ADDITION TO THE STATUTES WHICH CONFER BOTH CLASSES OF POWERS UPON THE SAME CORPORATION, CITED ON PAGES 28 TO 31 OF THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE, SEE:

COLORADO, Laws of 1915, ch. 48, approved April 12, 1915, p. 135–6, "An Act relating to banking," secs. 1 and 2.

MASSACHUSETTS, Acts of 1914, sec. 3, ch. 537, p. 473, "An Act relative to Trust Companies."

MISSOURI, Laws of 1915, p. 102, Art. 1, "State Banking Department," "An Act to repeal articles I, II and III of chapter 12 of the Revised Statutes of 1909, relating respectively to "State banking department," "banks of deposit and discount," and "trust companies" * * * and to enact in lieu of all thereof new articles entitled respectively

"state banking department," "Banks" and "trust companies," to be designated respectively as articles I, II and III of said chapter 12, with an emergency clause. Article III, "Trust Companies," sec. 127 (pp. 165–167).

OREGON, Laws of 1915, ch. 285, p. 427, "An act to amend sections 4559 etc. * * * pertaining to banks and bankers, and repealing all Acts and parts of Acts in conflict with the provisions of this Act."

VIRGINIA, ch. 486, p. 817, Laws of 1916, act approved March 22, 1916, provides "how trust companies may be incorporated, and to provide for general powers for the purpose of doing a trust business in this State in addition to a general banking business."

WYOMING, Laws of 1915, ch. 93, p. 104, "An Act permitting State Banks, Saving Banks and Loan and Trust Companies to act generally as agent, attorney, trustee, executor, administrator or guardian."

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FIRST NATIONAL BANK OF BAY CITY *v.* FELLOWS, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, ON THE RELATION OF UNION TRUST COMPANY ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. 764. Argued March 22, 23, 1917.—Decided June 11, 1917.

By the principles fully settled in *McCulloch* v. *Maryland* and *Osborn* v. *Bank*, and other cases, the implied power of Congress to confer a particular function upon a national bank is to be tested, not by the nature of the function viewed by itself, but by its relations to all

the functions and attributes of the bank considered as an entity; the necessity or appropriateness of the function should be considered with reference to the situation to which it relates; and, as to what is necessary or appropriate, a court should not substitute its judgment for the judgment of Congress.

As settled also by those cases, the circumstance that a function is of a class subject to state regulation does not prevent Congress from authorizing a national bank to exercise it; nor would it lie with the state power to forbid this.

A business not inherently such that Congress may empower national banks to engage in it may nevertheless become appropriate to their functions if, by state law, state banking corporations, trust companies, or other rivals of national banks are permitted to carry it on.

Section 11 (k) of the Act of December 23, 1913, establishing the Federal Reserve Board, in authorizing the board "To grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said board may prescribe," is, as here construed, a valid exercise of the power of Congress.

The section authorizes the specified functions to be exercised by national banks when the right to perform them is given by state law, or is deducible therefrom through being so conferred on state banks or corporations whose business in some degree rivals that of national banks; and it gives administrative power to the Reserve Board as a means of coördinating such functions, in their exercise by national banks, with the reasonable and nondiscriminating provisions of state law regulating their exercise as to state corporations.

The section is not open to the objection that it confers legislative power on the Reserve Board.

In providing that the specified functions may be exercised "when not in contravention of state or local law," Congress impliedly, if not expressly, authorized the institution and conduct in the state supreme court of proceedings in the nature of *quo warranto* to test whether the exercise of such functions by a national bank is consistent with the state law.

192 Michigan, 640, reversed.

THE case involves the validity of provisions in the Federal Reserve Bank Act authorizing national banks to act as trustees, etc., when allowed by the Reserve Board and not in contravention of state law; also the jurisdiction of

the state court to determine the authority of such banks in proceedings akin to *quo warranto*. The case is stated in the opinion.

Mr. W. C. Elliott and *Mr. Edward S. Clark*, with whom *Mr. H. M. Gillett* was on the briefs, for plaintiff in error.

Mr. Henry M. Campbell and *Mr. John G. Johnson* for defendants in error.

The Solicitor General, with whom *Mr. Joseph P. Cotton* and *Mr. Milton C. Elliott* were on the brief, for the United States, by leave of court.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

We are of opinion that the procedure resorted to was appropriate and that the state court was competent to administer relief, but we postpone stating our reasons on the subject until the merits have been passed upon.

The court below held that an act of Congress conferring on national banks additional powers was in excess of the authority of Congress and was hence repugnant to the Constitution. 192 Michigan, 640. The correctness of this conclusion is in substance the sole question for decision on the merits.

Although the powers given were new, the principles involved in the right to confer them were long since considered and defined in adjudged cases. We shall first consider the leading of such cases and then, after stating this case, determine whether they are controlling, causing the subject not to be open for original consideration.

In *McCulloch* v. *Maryland*, 4 Wheat. 316, the bank had been incorporated by Congress with powers to transact business of both a governmental and of a private character. The question which was decided was the authority of Congress to grant such charter. Without undertaking

to restate the opinion of Mr. Chief Justice Marshall, it suffices for the purpose of the matter now before us to say that it was held that although Congress was not expressly given the power to confer the charter, authority to do so was to be implied as appropriate to carry out the powers expressly given. In reaching this conclusion it was further decided that to recognize the existence of the implied power was not at all in conflict with Article I, § 8, clause 18, of the Constitution, providing that Congress should have power "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers," since that provision did not confine the implied authority to things which were indispensably necessary, but on the contrary gave legislative power to adopt every appropriate means to give effect to the powers expressly given. In terms it was pointed out that this broad authority was not stereotyped as of any particular time but endured, thus furnishing a perpetual and living sanction to the legislative authority within the limits of a just discretion enabling it to take into consideration the changing wants and demands of society and to adopt provisions appropriate to meet every situation which it was deemed required to be provided for. In fact the rulings which we have stated were all summed up in the following passage which ever since has been one of the principal tests by which to determine the scope of the implied power of Congress over subjects committed to its legislative authority:

"We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the

end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adpated to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." p. 421.

In *Osborn* v. *Bank*, 9 Wheat. 738, where substantially the subject was presented in the same form in which it had been passed upon in *McCulloch* v. *Maryland*, yielding to the request of counsel, the whole subject was reëxamined and the previous doctrines restated and upheld. Considering more fully, however, the question of the possession by the corporation of private powers associated with its public authority and meeting the contention that the two were separable and the one, the public power, should be treated as within and the other, the private, as without the implied power of Congress, it was expressly held that the authority of Congress was to be ascertained by considering the bank as an entity possessing the rights and powers conferred upon it and that the lawful power to create the bank and give it the attributes which were deemed essential could not be rendered unavailing by detaching particular powers and considering them isolatedly and thus destroy the efficacy of the bank as a national instrument. The ruling in effect was that although a particular character of business might not be when isolatedly considered within the implied power of Congress, if such business was appropriate or relevant to the banking business the implied power was to be tested by the right to create the bank and the authority to attach to it that which was relevant in the judgment of Congress to make the business of the bank successful. It was said: "Congress was of opinion, that these faculties were necessary, to enable the bank to perform the services which are exacted from it, and for which it was created. This was certainly a question proper for the consideration of the national legislature." p. 864.

As the doctrines thus announced have been reiterated in a multitude of judicial decisions and have been undeviatingly applied in legislative, and enforced in administrative action, we come at once to state the case before us to see whether such doctrines dispose without more as a mere question of authority of the subject under consideration.

Section 11 (k) of the Act of Congress approved December 23, 1913, establishing the Federal Reserve Board (38 Stat. 251, 262, c. 6), gives to that board authority "To grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said board may prescribe."

The First National Bank of Bay City having obtained the certificate required began the exercise of the powers stated. Thereupon certain trust companies which under the laws of Michigan had the authority to do the same character of business petitioned the Attorney General of the State to test the right of the national bank to use the functions on the ground that its doing so was contrary to the laws of the State of Michigan and that the action of the Federal Reserve Board purporting to give authority was in contravention of the Constitution of the United States. The Attorney General then, on the relation of the trust companies, commenced in the Supreme Court of the State a proceeding in the nature of *quo warranto* to test the right of the corporation to exercise the functions. The bank in defense fully stated its federal charter, the rights given by the act of Congress and the action of the Federal Reserve Board taken thereunder. The Attorney General demurred to this defence, first, because Congress had no power to confer the authority which was called in question; second, because if it had the power, it was without right to delegate to the Reserve Board the deter-

mination of when it should be used; and third, because the exercise of the powers was in contravention of the laws and authority of the State and the Reserve Board therefore under the act had no power to grant the certificate.

The case was heard by the full court. In an opinion of one judge which, it would seem, was written before the opinion of the court was prepared, it was elaborately reasoned that the exercise by a national bank of the functions enumerated in the section of the act of Congress under consideration would be contrary to the laws of the State and therefore the Reserve Board under the terms of the act of Congress had no power to authorize their exertion. The opinion of the court, however, fully examining the grounds thus stated and disagreeing with them, expressly decided that corporations were authorized by the state law to perform the functions in question and that the mere fact that national banks were federal corporations did not render them unfit to assume and perform such duties under the state law because the mere difference existing between the general administrative rules governing national banks and state corporations afforded no ground for saying that it would be contrary to state law for national banks to exert the powers under consideration. The authority conferred by the act of Congress and the rights arising from the certificate from such point of view were therefore upheld. Looking at the subject, however, from a consideration of the legislative power of Congress in the light of the decisions in *McCulloch* v. *Maryland* and *Osborn* v. *Bank* and recognizing that it had been settled beyond dispute that Congress had power to organize banks and endow them with functions both of a public and private character, and in the assumed further light of the rule that every reasonable intendment must be indulged in in favor of the constitutionality of a legislative power exercised, it was yet decided that Congress had no

authority to confer the powers embraced in the section of the act under consideration and hence that the section was void. The court following its reference to *McCulloch* v. *Maryland* and *Osborn* v. *Bank* and to passages in the opinions in those cases upholding the rightful possession by the bank of both public functions and private banking attributes, stated the grounds which led it to conclude that the rulings in the decided cases were distinguishable and therefore not controlling. It said:

"But in the reasoning of the judges, in the opinions to which I have referred, I find, I think, a conclusive argument supporting the proposition that congress has exceeded its constitutional powers in granting to banks the right to act as trustees, executors and administrators. If for mere profit it can clothe this agency with the powers enumerated, it can give it the rights of a trading corporation, or a transportation company, or both. There is, as Judge Marshall points out, a natural connection between the business of banking and the carrying on of federal fiscal operations. There is none, apparently, between such operations and the business of settling estates, or acting as the trustee of bondholders. This being so, there is in the legislation a direct invasion of the sovereignty of the State which controls not only the devolution of estates of deceased persons and the conducting of private business within the State, but as well the creation of corporations and the qualifications and duties of such as may engage in the business of acting as trustees, executors and administrators. Such an invasion I think the court may declare and may prevent by its order operating upon the offending agency."

But we are of opinion that the doctrine thus announced not only was wholly inadequate to distinguish the case before us from the rulings in *McCulloch* v. *Maryland* and *Osborn* v. *Bank*, but on the contrary directly conflicted with what was decided in those cases, that is to say, dis-

regarded their authority so as to cause it to be our duty to reverse for the following reasons:

1. Because the opinion of the court instead of testing the existence of the implied power to grant the particular functions in question by considering the bank as created by Congress as an entity with all the functions and attributes conferred upon it, rested the determination as to such power upon a separation of the particular functions from the other attributes and functions of the bank and ascertained the existence of the implied authority to confer them by considering them as segregated, that is, by disregarding their relation to the bank as component parts of its operations,—a doctrine which, as we have seen, was in the most express terms held to be unsound in both of the cases.

2. Because while in the premise to the reasoning the right of Congress was fully recognized to exercise its legislative judgment as to the necessity for creating the bank including the scope and character of the public and private powers which should be given to it, in application the discretion of Congress was disregarded or set aside by exercising judicial discretion for the purpose of determining whether it was relevant or appropriate to give the bank the particular functions in question.

3. Because even under this mistaken view the conclusion that there was no ground for implying the power in Congress was erroneous because it was based on a mistaken standard, since for the purpose of testing how far the functions in question which were conferred by the act of Congress on the bank were relevant to its business or had any relation to discrimination by state legislation against banks created by Congress it considered not the actual situation, that is, the condition of the state legislation, but an imaginary or non-existing condition, that is, the assumption that so far as the state power was concerned the particular functions were in the State enjoyed

only by individuals or corporations not coming at all, actually or potentially, in competition with national banks. And the far-reaching effect of this error becomes manifest when it is borne in mind that plainly the particular functions enumerated in the statute were conferred upon national banks because of the fact that they were enjoyed as the result of state legislation by state corporations, rivals in a greater or less degree of national banks.

4. In view of the express ruling that the enjoyment of the powers in question by the national bank would not be in contravention of the state law, it follows that the reference of the court below to the state authority over the particular subjects which the statute deals with must have proceeded upon the erroneous assumption that because a particular function was subject to be regulated by the state law, therefore Congress was without power to give a national bank the right to carry on such functions. But if this be what the statement signifies, the conflict between it and the rule settled in *McCulloch* v. *Maryland* and *Osborn* v. *Bank*, is manifest. What those cases established was that although a business was of a private nature and subject to state regulation, if it was of such a character as to cause it to be incidental to the successful discharge by a bank chartered by Congress of its public functions, it was competent for Congress to give the bank the power to exercise such private business in coöperation with or as part of its public authority. Manifestly this excluded the power of the State in such case, although it might possess in a general sense authority to regulate such business, to use that authority to prohibit such business from being united by Congress with the banking function, since to do so would be but the exertion of state authority to prohibit Congress from exerting a power which under the Constitution it had a right to exercise. From this it must also follow that even although a business be of such a character that it is not inherently considered susceptible of

being included by Congress in the powers conferred on national banks, that rule would cease to apply if by state law state banking corporations, trust companies, or others which by reason of their business are rivals or *quasi*-rivals of national banks are permitted to carry on such business. This must be since the State may not by legislation create a condition as to a particular business which would bring about actual or potential competition with the business of national banks and at the same time deny the power of Congress to meet such created condition by legislation appropriate to avoid the injury which otherwise would be suffered by the national agency. Of course as the general subject of regulating the character of business just referred to is peculiarly within state administrative control, state regulations for the conduct of such business, if not discriminatory or so unreasonable as to justify the conclusion that they necessarily would so operate, would be controlling upon banks chartered by Congress when they came in virtue of authority conferred upon them by Congress to exert such particular powers. And these considerations clearly were in the legislative mind when it enacted the statute in question. This result would seem to be plain when it is observed (a) that the statute authorizes the exertion of the particular functions by national banks when not in contravention of the state law, that is, where the right to perform them is expressly given by the state law or what is equivalent is deducible from the state law because that law has given the functions to state banks or corporations whose business in a greater or less degree rivals that of national banks, thus engendering from the state law itself an implication of authority in Congress to do as to national banks that which the state law has done as to other corporations; and (b) that the statute subjects the right to exert the particular functions which it confers on national banks to the administrative authority of the Reserve Board, giving besides to that Board power to

adopt rules regulating the exercise of the functions conferred, thus affording the means of coördinating the functions when permitted to be discharged by national banks with the reasonable and non-discriminating provisions of state law regulating their exercise as to state corporations, —the whole to the end that harmony and the concordant exercise of the national and state power might result.

Before passing to the question of procedure we think it necessary to do no more than say that a contention which was pressed in argument and which it may be was indirectly referred to in the opinion of the court below that the authority given by the section to the Reserve Board was void because conferring legislative power on that board, is so plainly adversely disposed of by many previous adjudications as to cause it to be necessary only to refer to them. *Field* v. *Clark*, 143 U. S. 649; *Butfield* v. *Stranahan*, 192 U. S. 470; *United States* v. *Grimaud*, 220 U. S. 506; *Monongahela Bridge Company* v. *United States*, 216 U. S. 177; *Intermountain Rate Cases*, 234 U. S. 476.

The question of the competency of the procedure and the right to administer the remedy sought, then remains. It involves a challenge of the right of the State Attorney General to resort in a state court to proceedings in the nature of *quo warranto* to test the power of the corporation to exert the particular functions given by the act of Congress because they were inherently federal in character, enjoyed by a federal corporation and susceptible only of being directly tested in a federal court. Support for the challenge in argument is rested upon *Ableman* v. *Booth*, 21 How. 506; *Tarble's Case*, 13 Wall. 397; *Van Reed* v. *People's National Bank*, 198 U. S. 554, 557; *State ex rel. Wilcox* v. *Curtis*, 35 Connecticut, 374. But without inquiring into the merits of the doctrine upon which the proposition rests we think when the contention is tested by a consideration of the subject-matter of this particular controversy it cannot be sustained. In other words, we

are of opinion that as the particular functions in question by the express terms of the act of Congress were given only "when not in contravention of State or local law," the state court was, if not expressly, at least impliedly authorized by Congress to consider and pass upon the question whether the particular power was or was not in contravention of the state law, and we place our conclusion on that ground. We find no ambiguity in the text, but if it be that ambiguity is latent in the provision, a consideration of its purpose would dispel doubt especially in view of the interpretation which we have given the statute and the contrast between the clause governing the subject by the state law and the provision conferring administrative power on the Reserve Board. The nature of the subject dealt with adds cogency to this view since that subject involves the action of state courts of probate in a universal sense, implying from its very nature the duty of such courts to pass upon the question and the power of the court below within the limits of state jurisdiction to settle so far as the State was concerned the question for all such courts by one suit, thus avoiding the confusion which might arise in the entire system of state probate proceedings and the very serious injury to many classes of society which also might be occasioned. And our conclusion on this subject is fortified by the terms of § 57, c. 106, 13 Stat. 116, making controversies concerning national banks cognizable in state courts because of their intimate relation to many state laws and regulations, although without the grant of the act of Congress such controversies would have been federal in character.

As it follows from what we have said that the court below erred in declaring the section of the act of Congress to be unconstitutional, the judgment must be reversed and the case remanded for further proceedings not inconsistent with this opinion.

And it is so ordered.

MR. JUSTICE VAN DEVANTER, dissenting.

I dissent from the conclusion that this proceeding could be brought and maintained in the state court. It is an information in the nature of a *quo warranto* against a federal corporation, a national bank. It calls in question the bank's right to exercise a privilege claimed under an act of Congress, the privilege, under the terms of the act, being conferred only when "not in contravention of State or local law." The information was brought by the Attorney General of the State in his own name, and charges that the bank's exercise of the privilege is "in contempt of the people of the State," by which it is meant, as the record discloses, first, that the exercise of the privilege by the bank is in contravention of the law of the State, and, second, that the act of Congress under which the privilege is claimed transcends the power of Congress and is void. The state court dealt with both grounds. The first was overruled and the second sustained. The judgment rendered enjoins and excludes the bank from exercising the privilege.

The writ of *quo warranto* was a prerogative writ and the modern proceeding by information is not different in that respect. When it is brought to exclude the exercise of a franchise, privilege or power claimed under the United States it can only be brought in the name of the United States and by its representative, or in such other mode as it may have sanctioned. *Wallace* v. *Anderson*, 5 Wheat. 291; *Territory* v. *Lockwood*, 3 Wall. 236; *Newman* v. *Frizzell*, 238 U. S. 537. As is said in the *Lockwood Case*, "the right to institute such proceedings is inherently in the Government of the nation." This is particularly true of national banks, for they not only derive all their powers from the United States, but are instrumentalities created by it for a public purpose, and "are not to be interfered with by state legislative or judicial action, except so far

as the law making power of the Government may permit." *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, 283; *Van Reed* v. *People's National Bank*, 198 U. S. 554, 557. Indeed, they are upon much the same plane as are officers of the United States, because their conduct can only be controlled by the power that created them. *McClung* v. *Silliman*, 6 Wheat. 598, 605. If it were otherwise the supremacy of the United States and of its Constitution and laws would be seriously imperiled. *Ableman* v. *Booth*, 21 How. 506; *Tarble's Case*, 13 Wall. 397; *Tennessee* v. *Davis*, 100 U. S. 257; *State ex rel. Wilcox* v. *Curtis*, 35 Conn. 374.

Thus much, as I understand it, is conceded in this court's opinion, the conclusion that the state court could entertain the information and proceed to judgment thereon, as was done, being rested upon an implied authorization by Congress. This authorization is thought to be found in the provision stating that the privilege claimed is given only "when not in contravention of State or local law" and in the provision in the Act of June 3, 1864, c. 106, § 57, 13 Stat. 116, now in Rev. Stats., § 5198, which makes suits against national banks cognizable in certain state courts. I do not find any such authorization in either provision.

The first does no more than to withhold the privilege in question from national banks located in States whose laws are opposed to or not in harmony with the possession and exercise of such a privilege on the part of the banks. It says nothing about judicial proceedings—nothing about who shall bring them or where they shall be brought. There is in it no suggestion that *quo warranto* proceedings were in the mind of Congress. Had there been a purpose to do anything so unusual as to authorize a state officer to institute and conduct such a proceeding in a state court against a federal corporation, is it not reasonable to believe that Congress would have given expression to that pur-

pose? As before indicated, it said nothing upon the point,—just as it would have done had no such purpose been in mind. But if the words "when not in contravention of State or local law" could be regarded as giving any warrant for a *quo warranto* proceeding by a state officer in a state court, I should say they would do no more than to permit such a proceeding to determine whether the privilege was in contravention of the state law. There is nothing in them which points even remotely to a purpose to sanction a proceeding to determine the power of Congress under the Constitution to clothe a national bank with the privilege indicated. That would be without any precedent in the legislation relating to federal corporations, and I submit that it is most improbable that Congress either did or would entertain such a purpose.

The provision cited from the Act of 1864 has been in the statutes for fifty-three years and no one seems ever to have thought until now that it was intended to authorize a proceeding such as this against a national bank. I think its words do not fairly lend themselves to that purpose. They have hitherto been regarded, and in practice treated, as referring to ordinary suits such as may be conveniently prosecuted against a bank in its home town and county. Besides, the terms of the provision show that it can have no application here. After providing for suing a national bank in the federal or territorial court of the district in which it is established, the provision adds, "or in any state, county, or municipal court in the county or city in which said association is located." This bank, as the record discloses, is located in Bay City, Bay County. The proceeding was begun and had in the Supreme Court of the State at the capital, which is Lansing, Ingham County. Therefore the provision can give no support to the proceeding.

For these reasons I think the judgment should be re-

versed with a direction to dismiss the information for want of jurisdiction.

MR. JUSTICE DAY authorizes me to say that he concurs in this dissent.